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Major League Soccer as a Case Study in Complexity Theory

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MAJOR LEAGUE SOCCER AS A CASE STUDY IN COMPLEXITY THEORY

STEVEN A. BANK*

ABSTRACT

Major League Soccer has long been criticized for its “Byzantine” roster rules and regulations, rivaled only by the Internal Revenue Code in its complexity. Is this criticism fair? By delving into complexity theory and the unique nature of the league, this Article argues that the traditional complaints may not apply in the context of the league’s roster rules. Effectively, critics are applying the standard used to evaluate the legal complexity found in rules such as statutes and regulations when the standard used to evaluate contractual complexity is more appropriate. Major League Soccer’s system of roster rules is the product of a contractual and organizational arrangement among the investor-operators. Its rules are complex in order to keep the investors aligned toward a common goal, while remaining flexible enough to pursue new opportunities and to react to changing circumstances. Although this complexity frustrates fans and other outside observers, it may be essential to ensuring the continued stability and future growth of the league.

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One of the most criticized aspects of Major League Soccer (“MLS”) is not the quality of its play or the reach of its marketing,¹ but rather the complexity of its roster rules and regulations.² There are Designated Players, young Designated Players, Homegrown Players, International Players, Generation Adidas players, Senior Roster players, Supplemental Roster players, Reserve Roster players, Special Discovery Players, USL Priority Players and Short Term Agreements, Extreme Hardship Call-Ups, Season-Ending Injury Replacements, and Short-Term Injury Replacements. There is a SuperDraft, a Re-Entry Draft, and a Waiver Draft, as well as an Allocation Process, a Discovery Process, Rights of First Refusal, and College Protected Players. Plus, there are trades, limited free agency, loans (both inter- and intra-league), and transfers (but only during the Primary or Secondary Transfer Windows). Clubs are subject to a version of a salary cap called a Salary Budget, but they can pay for player acquisitions beyond that amount with General Allocation Money and Targeted Allocation Money, although the amount available to teams in the former category is generally not specified or made transparent. And, of course, in a system of rules that are opaque and constantly in flux, plenty of players currently in the league were acquired or retained through other mechanisms that are no longer in existence, such as Retention Funds or Weighted Lotteries,³ that appear to never have been formally in existence under the rules, such as Blind Draws,⁴ or that are only in existence when necessary, such as an Expansion Draft or a Dispersal Draft.⁵

1. MLS is still dismissed by those comparing it to the English Premier League or Spain’s La Liga, but at the conclusion of its 20th season, MLS has been generally praised for the strides it has made on the field and off the field in advancing the popularity of the game in America. Matt Slater, *MLS at 20: How Football in the USA Is Thriving at Last*, BBC SPORT (Dec. 6, 2015), <http://www.bbc.com/sport/0/football/35012676?print=true>.
2. *2017 MLS Roster Rules and Regulations*, MLS SOCCER (Feb. 1, 2017, 11:00 AM), <https://www.mlssoccer.com/post/2017/01/01/mls-roster-rules-and-regulations-2017> [<https://perma.cc/H2LJ-RXWS>].
3. Ben Bromley, *Sorting Through the MLS Roster Rules for Player Acquisition*, BLACKANDREDUNITED.COM (Nov. 28, 2012, 10:00 AM), <http://www.blackandredunited.com/2012/11/28/3692472/mls-roster-rules-designated-player-allocation-homegrown-discovery-trade> [<https://perma.cc/L55U-UPLK>]; Kyle McCarthy, *Monday MLS Breakdown: Retention Fund Makes Perfect Sense, Raises Questions as League Builds for the Future*, GOAL.COM (July 8, 2013, 9:10 AM), <http://www.goal.com/en-us/news/1110/major-league-soccer/2013/07/08/4102782/monday-mls-breakdown-retention-fund-makes-perfect-sense> [<https://perma.cc/N4K3-K7VL>].
4. Steven Goff, *Jermaine Jones Joins New England Revolution. Here’s How*, WASH. POST (Aug. 25, 2014), <http://www.washingtonpost.com/blogs/soccer-insider/wp/2014/08/25/jermaine-jones-joins-new-england-revolution-heres-how/> [<http://perma.cc/85DD-LTLT>]. But see Dan Dickinson, *Gothamist Speaks with MLS Commissioner Don Garber*,

This system has been variously described as “Byzantine,”⁶ “murky,”⁷ and “unusual.”⁸ Even those versed in the minutiae complain that it makes their head spin.⁹ One observer suggested that the player acquisitions rules are just further evidence of “a league that seems determined to compete with the Internal Revenue Service in terms of opacity and complexity.”¹⁰

Certainly MLS’ system of roster rules is complicated, but other U.S. sports leagues have complicated processes that include various forms of drafts, salary caps, and free agency as well.¹¹ A similar article could likely be written about most of those other leagues. What makes MLS unique, however, is the “oft-changing” nature of the

GOTHAMIST.COM (Sept. 4, 2014, 4:32 PM), http://gothamist.com/2014/09/04/gothamist_speaks_with_mls_commissio.php [<https://perma.cc/W77G-NUAF>] (in an interview, Garber claims that “it was a little unfair to call it a blind draw,” because it was done over Skype with both teams).

5. *Official MLS Expansion Draft Rules*, MLS SOCCER (Oct. 16, 2010, 2:57 PM), <http://www.mlssoccer.com/news/article/official-mls-expansion-draft-rules> [<https://perma.cc/9JKY-PGQC>]. The expansion draft may also be on its way out. *See* Kristian Dyer, *Source: MLS Discussing Elimination of Expansion Draft*, YAHOO! SPORTS (Nov. 17, 2015, 4:40 AM), <http://sports.yahoo.com/blogs/soccer-fc-yahoo/mls-might-end-expansion-draft-093724765.html> [<https://perma.cc/9TL9-ATQ2>]. A Dispersal Draft has been conducted to reallocate players after a team is disbanded, which most recently occurred with the shuttering of Chivas USA. Jim Peltz, *Seven Players from Defunct Chivas USA Chosen in MLS Dispersal Draft*, L.A. TIMES (Nov. 19, 2014, 2:36 PM), <http://www.latimes.com/sports/sportsnow/la-sp-sn-mls-chivas-dispersal-draft-20141119-story.html> [<https://perma.cc/XG5B-PHAA>].

6. Kevin Baxter, *Teams Work with MLS’ Complex Pay Structure*, L.A. TIMES, (July 19, 2015, 12:16 PM), http://www.atlanticbb.net/news/read/category/sports/article/los_angeles_times-kevin_baxter_teams_work_with_mls_complex_pay_struc-tea [<https://perma.cc/SEA2-KESD>]; Brian Sciarretta, *Targeted Allocation Money: MLS Gets More Complex*, AMERICAN SOCCER NOW (July 11, 2015, 11:55 AM), <http://americansoccernow.com/articles/targeted-allocation-money-mls-gets-more-complex> [<https://perma.cc/7W75-DVZU>].

7. Jason Davis, *The Murky MLS Acquisition Rules*, US SOCCER PLAYERS (Feb. 1, 2012), <http://www.ussoccerplayers.com/2012/02/the-murky-mls-acquisition-rules.html> [<https://perma.cc/AP7J-UVPQ>].

8. Josie Becker, *MLS Player Acquisition Rules: A Primer*, LAG CONFIDENTIAL (July 29, 2014, 4:08 PM), <http://www.lagconfidential.com/2014/7/29/5949921/mls-player-acquisition-rules-a-primer> [<https://perma.cc/YAW3-N89R>].

9. Zach Woosley, *MLS 101: New Player Drafts, Generation Adidas, Trades, Waivers and Roster Exceptions*, DYNAMO THEORY (Jan. 20, 2012, 2:45 PM), <http://www.dynamotheory.com/2012/1/20/2721398/mls-101-drafts-generation-adidas-trades> [<https://perma.cc/M9K8-W4T9>].

10. Sciarretta, *supra* note 6.

11. *See, e.g.*, PATRICK K. THORNTON, SPORTS LAW 213 (2011); Terry Pluto, *Cleveland Cavaliers Scribbles About Trade Exceptions*, J.R. Smith and Delly, CLEVELAND PLAIN DEALER (July 27, 2015, 3:12 PM), http://www.cleveland.com/pluto/index.ssf/2015/07/cleveland_cavaliers_scribbles_26.html#incart_river [<https://perma.cc/FLV8-ZN96>] (“The NBA salary cap rules are like the IRS code or NCAA regulations. You need several accountants and lawyers to figure them out and put together deals.”); Greg Price, *2015 NFL Free Agency: Explaining Franchise Tag, Dead Money, Salary Cap Hits and More*, INT’L BUS. TIMES (Feb. 24, 2015, 10:04 AM), <http://www.ibtimes.com/2015-nfl-free-agency-explaining-franchise-tag-dead-money-salary-cap-hits-more-1825640> [<https://perma.cc/9J7X-94YY?type=image>].

rules,¹² which are “prone to being amended on the fly if the men in the corner offices deem it convenient.”¹³ And when it is deemed “convenient” seems to be code word for when one of the most powerful owners wants it changed. This leads to charges that the rules are not merely complex, but structurally and systematically “unfair.”¹⁴ As one observer noted, “certain parts of the process appear to outsiders as ‘being made up as it goes along’ to give favor to one club over others.”¹⁵

Is this criticism fair? Could there be an implicit or explicit method to the seemingly ad hoc and unprincipled manner in which MLS rules appear to be written? By delving into complexity theory and the unique nature of MLS, this Article argues that the traditional complaints about complexity may not apply in the context of MLS’ roster rules. Effectively, critics of the MLS system are applying the standards used to evaluate *legal* rules such as statutes and regulations when the standards used to evaluate *contractual* provisions are more appropriate.

There is fairly rich scholarly literature that seeks to explain the complexity of legal rules.¹⁶ Broadly speaking, experts in this area

12. Kevin Baxter, *Galaxy Facing Decisions in Off-Season Retooling*, L.A. TIMES (Dec. 4, 2015, 1:59 PM), <http://www.latimes.com/sports/sportsnow/la-sp-sn-galaxy-facing-decisions-in-offseason-retooling-20151204-story.html> [<https://perma.cc/TW3S-N6F8>].

13. Leander Schaerlaeckens, *The Heavy Price MLS Pays for Not Showing How It Spends Its Money*, YAHOO! SPORTS (Dec. 4, 2015, 12:38 AM), http://sports.yahoo.com/blogs/soccer-fc-yahoo/mls-still-won-t-show-you-the-money-045602708.html?soc_src=mediacontentstory&soc_trk=tw [<https://perma.cc/QEW6-R69Y>].

14. Hank Stebbins, *Blind Draw: How Major League Soccer's Single Entity Structure and Unique Rules Have Impacted Soccer in the United States*, 13 WILLAMETTE SPORTS L.J. 1, 15 (2015) (“High-level players are often assigned to teams through a number of devices that often seem arbitrary, unfair, and confusing.”); James Starritt, *Why MLS Roster Rules Are Unfair, and How to Fix Them*, THE BLUE TESTAMENT (July 1, 2015, 10:55 AM), <http://www.thebluetestament.com/2015/7/1/8877215/why-mls-roster-rules-are-unfair-and-how-to-fix-them> [<https://perma.cc/2KNC-HLVH>].

15. Kip Keskard, *Dempsey's Return to MLS Calls MLS Player Acquisition Models into Question*, OREGONIAN (Aug. 8, 2013, 10:17 AM), http://blog.oregonlive.com/timbers/2013/08/dempseys_return_to_mls_but_tran.html [<https://perma.cc/6MK8-S78V>]; see Doug McIntyre, *MLS Tackles the Issue of Transparency*, ESPN FC (Apr. 23, 2008), <http://www.espnfc.com/story/528307> (“MLS has taken some well-deserved heat throughout its history for what many view as a make-it-up-as-you-go-along attitude towards its own arcane set of rules and regulations.”).

16. See, e.g., Jason P. Davis et al., *Optimal Structure, Market Dynamism, and the Strategy of Simple Rules*, 54 ADMIN. SCI. Q. 413 (2009); Eric Kades, *The Laws of Complexity and the Complexity of Laws: The Implications of Computational Complexity Theory for the Law*, 49 RUTGERS L. REV. 403 (1997); Louis Kaplow, *A Model of the Optimal Complexity of Legal Rules*, 11 J.L. ECON. & ORG. 150 (1995); John A. Miller, *Indeterminacy, Complexity, and Fairness: Justifying Rule Simplification in the Law of Taxation*, 68 WASH. L. REV. 1 (1993); J.B. Ruhl, *Law's Complexity: A Primer*, 24 GA. ST. U. L. REV. 885 (2008); J.B. Ruhl, *Complexity Theory as a Paradigm for the Dynamical Law-and-Society System: A Wake-Up Call for Legal Reductionism and the Modern Administrative State*, 45 DUKE L.J. 849 (1996); J.B. Ruhl, *The Fitness of Law: Using Complexity Theory to Describe the Evolution of Law and Society and Its Practical Meaning for Democracy*, 49 VAND. L. REV. 1406 (1996); Peter H. Schuck, *Legal Complexity: Some Causes, Consequences, and Cures*, 42 DUKE L.J. 1 (1992); R. George Wright, *The Illusion of*

recognize that intentionally complex rules generally pose a tradeoff between fairness and efficiency. They permit authorities to more fairly differentiate between certain types of actions when imposing consequences, but when these rules become too complicated for participants to understand and for courts to mediate disputes regarding their application to specific situations, then the costs may weigh in favor of simplification.¹⁷

The complexity of contractual provisions has also received significant attention, particularly in the area of transaction-cost economics,¹⁸ as well as in the context of cooperative ventures such as strategic technology alliances.¹⁹ Unlike legal complexity, which generally addresses the complexity of rules imposed by the government to regulate the behavior of its residents, contractual complexity is focused on the complexity of rules that parties consensually agree to be bound by in order to regulate each other's behavior. In long-term contracting such as in a joint venture, complex provisions are typically designed to prevent partners from free-riding or acting opportunistically, while allowing the venture to retain the flexibility to pursue shared objectives.²⁰

Major League Soccer's roster rules may appear to be analogous to government rules and regulations, but their underlying basis is contractual. The league is a single-entity limited liability company with

Simplicity: An Explanation of Why the Law Can't Just Be Less Complex, 27 FLA. ST. U. L. REV. 715 (2000).

17. Kaplow, *supra* note 16, at 150-51.

18. See, e.g., Paul L. Joskow, *Contract Duration and Relationship-Specific Investments: Empirical Evidence from Coal Markets*, 77 AM. ECON. REV. 168 (1987); Oliver E. Williamson, *Comparative Economic Organization: The Analysis of Discrete Structural Alternatives*, 36 ADMIN. SCI. Q. 269 (1991); Oliver E. Williamson, *Transaction-Cost Economics: The Governance of Contractual Relations*, 22 J.L. & ECON. 233 (1979) [hereinafter Williamson, *Transaction-Cost Economics*]. For examples in the legal literature, see Karen Eggleston, Eric A. Posner & Richard Zeckhauser, *The Design and Interpretation of Contracts: Why Complexity Matters*, 95 NW. U. L. REV. 91 (2000); J. Harold Mulherin, *Complexity in Long-Term Contracts: An Analysis of Natural Gas Contractual Provisions*, 2 J.L. ECON. & ORG. 105 (1986).

19. See, e.g., John Hagedoorn & Geerte Heslen, *Contractual Complexity and the Cognitive Load of R&D Alliance Contracts*, 6 J. EMPIRICAL LEGAL STUD. 818 (2009); Joanne E. Oxley, *Appropriability Hazards and Governance in Strategic Alliances: A Transaction Cost Approach*, 13 J.L. ECON. & ORG. 387 (1997); Anupama Phene & Stephen Tallman, *Complexity, Context and Governance in Biotechnology Alliances*, 43 J. INT'L BUS. STUD. 61 (2012); Jeffrey J. Reuer & Africa Ariño, *Strategic Alliance Contracts: Dimensions and Determinants of Contractual Complexity*, 28 STRATEGIC MGMT. J. 313 (2007); Jeffrey J. Reuer & Africa Ariño, *Strategic Alliances as Contractual Forms*, ACADEMY MGMT. PROC. R1 (2003); Jochen Schweitzer & Siegfried P. Gudergan, *Contractual Complexity, Governance and Organisational Form in Alliances*, 2 INT'L J. STRATEGIC BUS. ALLIANCES 26 (2011).

20. Zeynep Hansen & Matthew Higgins, *The Effect of Contractual Complexity on Technology Sourcing Agreements* 4-5 (Ga. Inst. of Tech., Working Paper No. 4979, 2007), https://mpra.ub.uni-muenchen.de/4979/1/MPRA_paper_4979.pdf [<https://perma.cc/TPP2-KL77>].

investors who contract to operate the individual teams (the “investor-operators”), rather than a separate entity organizing competition among independently-owned teams.²¹ This means that all of the investor-operators have a stake in the league and in the performance of all of its teams. The teams may compete on the playing field, but the investor-operators share in both the profits and the expenses of all of the other teams.²² Although the investor-operators have grown more independent over the years, they remain tied together by this basic organizational feature.

Given the single-entity nature of the league, it makes little sense to evaluate the roster rules as legal rules. Not only have the league’s investor-operators consented to these rules by virtue of both the limited liability company agreement and their individual operator agreements, but they each have a seat on the governing board of the league. In this sense, MLS’ system of roster rules is the product of a contractual and organizational arrangement among the investor-operators. As such, they are not complex to ensure fairness among the teams; rather, they are complex because of the need to keep investor-operators aligned and to enable MLS to remain flexible in the face of global competition and opportunities. While this frustrates fans and other outside observers, it may be essential to ensuring the continued stability and future growth of the league.

This Article explains why the complexity of the MLS roster rules is a design feature rather than a flaw. Part I sets the background by describing the origins and legal structure of MLS. In Part II, the Article details MLS’ roster rules and regulations and the aspects that appear to make it complex, highlighting the complaints about the technical detail, opacity, and apparent favoritism of the constantly changing system. To start to better understand whether the criticism of MLS’ complexity is accurate and justified, Part III discusses what we might mean when we identify something as “complex,” whether in the context of legal rules or contractual provisions, and the rationales that are offered in each case. This sets the stage for Part IV, where

21. Joseph Lennarz, *Growing Pains: Why Major League Soccer’s Steady Rise Will Bring Structural Changes in 2015*, 16 U. DENV. SPORTS & ENT. L.J. 137, 142 (2014).

22. This distinguishes it from revenue sharing in other U.S. professional sports. Under those arrangements, teams may split the television money, gate receipts, and merchandising income, but rival owners do not share the risk that one of their opponents may not be able to make payroll. Compare Kevin Baxter, *MLS Goes from Near Extinction to Remarkable Success*, L.A. TIMES (Dec. 5, 2015, 4:30 PM), <http://www.latimes.com/sports/soccer/la-sp-soccer-baxter-20151206-story.html> [<https://perma.cc/K2JA-NXHW>] (describing how a number of owners had to “bankroll multiple teams” for the league to survive a financial crisis in 2001), with Howard Bloom, *NFL Revenue-Sharing Model Good for Business*, SPORTING NEWS (Sept. 5, 2014, 1:25 PM), <http://www.sportingnews.com/nfl/story/2014-09-05/nfl-revenue-sharing-television-contracts-2014-season-business-model-nba-nhl-mlb-comparison-salary-cap> [<https://perma.cc/9TAB-ML9V>] (describing the method of sharing revenues used by the National Football League).

the Article explains why the efficiency/fairness tradeoff use to evaluate legal complexity is not applicable in the context of MLS' player acquisition system. This Part offers an alternative justification for complexity grounded in MLS' hybrid single-entity structure and the youthful league's place in a highly competitive global marketplace. Given the need to keep MLS' investor-operators aligned as the league pursues opportunities to improve its quality and broaden its reach, the Article concludes that the current state of complexity is likely to remain important for the foreseeable future.

I. AN INTRODUCTION TO MAJOR LEAGUE SOCCER

A. *Origins*

Major League Soccer was formed in 1995 and launched play in 1996. It formally traces its origins to a promise the United States Soccer Federation ("U.S. Soccer") made to FIFA in 1988 to form a first division professional soccer league if it was successful in its bid to host the World Cup in 1994.²³ The real roots of MLS, however, were shaped by developments occurring several decades earlier.

America's first attempt to create a top professional soccer league occurred in 1967. At that time, the forerunner of the original North American Soccer League ("NASL") embarked on an ambitious effort to establish pro soccer in this country.²⁴ Luring top stars like Pele, Franz Beckenbauer, George Best, and Johan Cruyff, the League sought to spend its way to prominence. For a stretch of years in the mid- to late-1970s, this succeeded with national television audiences and packed stadiums in many cities. In 1977, for example, the New York Cosmos drew crowds of 77,691 and 73,669 in home playoff games leading up to a Soccer Bowl matchup with the Seattle Sounders, which itself had drawn crowds of 42,091 and 56,256 in playoff

23. *Fraser v. Major League Soccer, L.L.C. (Fraser II)*, 284 F.3d 47, 52-53 (1st Cir. 2002); Lennarz, *supra* note 21, at 141; Diana C. Taylor, Comment, *Aimed at the Goal?: The Sustainability of Major League Soccer's Structure*, 9 WILLAMETTE SPORTS L.J. 1, 2 (2011). The original agreement with FIFA had stipulated that a first division league must commence before the World Cup was held, but U.S. Soccer renegotiated the deal on the grounds that the World Cup's ability to raise the profile of the game in America must occur before a new league could be successful. Fernando Delgado, *Major League Soccer: The Return of the Foreign Sport*, 21 J. SPORT & SOC. ISSUES 285, 295 n.1 (1997).

24. The North American Soccer League actually started in 1968 as the product of a merger between the FIFA-sanctioned United Soccer Association and the unsanctioned National Professional Soccer League. *NASL 1968-1984: A Review of the Golden Era*, NASL, <http://www.nasl.com/a-review-of-the-golden-era> [https://perma.cc/N9BV-LHDK]; Steve Davis, *A Little History to Consider Re MLS and the Wonderful Old NASL*, NBC SPORTS (Nov. 2, 2012, 3:35 PM), <http://soccer.nbcsports.com/2012/11/02/a-little-history-to-consider-re-mls-and-the-wonderful-old-nasl/> [https://perma.cc/6JKW-JJT9].

games on its home turf.²⁵ Ultimately, however, the free spending ways led to the League's demise. Paying extravagant salaries to a few aging stars did attract attention, but at the same time, it drove up salaries for all of the League's players and attendance in many cities lagged behind that of the super clubs.²⁶ Ultimately, the business model became unsustainable. By the end of the 1984 season, the League folded.²⁷

The spiraling costs and subsequent demise of NASL had a profound influence on the people responsible for creating the structure for Major League Soccer.²⁸ Alan Rothenberg, the President of U.S. Soccer during the creation of the new league, had been a part-owner of the NASL's Los Angeles Aztecs and was, therefore, intimately familiar with the failings of the prior attempt at first division soccer in this country.²⁹ This led him to search for a new organizational structure that would avoid the profligate spending that had characterized NASL.

B. Organizational Structure

In creating MLS, Rothenberg and the other founders knew that they needed a centralized structure to control costs in a way that would avoid antitrust challenges.³⁰ They chose to use a single-entity limited liability company. As originally conceived, the limited liability company under this form of organization would enter into all player contracts, broadcasting deals, marketing deals, and even stadium deals as an entity. The teams would be mere divisions of the organization itself and the "owners" of those teams would merely be investors who receive membership interests in the limited liability company.

Even before the league rolled out, the original plan had to be tweaked to attract a sufficient number of investors.³¹ Thus, rather than relying on a wholly passive investment entity structure, the league entered into contracts with the investors to operate individual teams.³² Subject to league-wide rules, these "investor-operators" had

25. TED PHILIPAKOS, ON LEVEL TERMS: 10 LEGAL BATTLES THAT TESTED AND SHAPED SOCCER IN THE MODERN ERA 46 (2015).

26. John Francis & Congcong Zheng, *Learning Vicariously from Failure: The Case of Major League Soccer and the Collapse of the North American Soccer League*, 35 GROUP & ORG. MGMT. 542, 552 (2010); Lennarz, *supra* note 21, at 140.

27. Lennarz, *supra* note 21, at 140-41.

28. Francis & Zheng, *supra* note 26, at 552, 556; Lennarz, *supra* note 21, at 141; Taylor, *supra* note 23, at 2.

29. Lennarz, *supra* note 21, at 141.

30. Edward Mathias, Comment, *Big League Perestroika? The Implications of Fraser v. Major League Soccer*, 148 U. PA. L. REV. 203, 220-21 (1999).

31. See PAUL C. WEILER ET AL., SPORTS AND THE LAW: TEXT, CASES, AND PROBLEMS 291 (5th ed. 2015).

32. See *Fraser v. Major League Soccer, L.L.C. (Fraser II)*, 284 F.3d 47, 53 (1st Cir. 2002).

the right to hire their own front offices and coaches, select where their games would be played, set ticket prices, and enter into and retain the proceeds of local promotional deals. The central office signed players to the league and allocated them to individual teams, with some input from the investor-operators, and the league paid player salaries from the revenues it received from all merchandising and national broadcast contracts, as well as half of the local ticket, concessions, and broadcasting revenues received by each investor-operator and remitted to the league.³³

In the league's early years, this modification to the single-entity structure did not do much to change the centralized nature of the league. Seven of the ten teams were run by investor-operators, but the league itself operated the three remaining teams.³⁴ By 1998, three owners (Robert Kraft, Lamar Hunt, and Phillip Anschutz) operated a majority of all of the league's teams.³⁵ A few years later in 2002, with the league in financial trouble after the demise of the two Florida-based teams—the Miami Fusion and the Tampa Bay Mutiny—Anschutz came to the rescue, owning/operating half of the league's ten teams, with Kraft and Hunt owning three of the remaining five teams.³⁶ If the teams and their operations were not completely controlled by MLS, as originally conceived by Rothenberg, they were largely so because of the concentration of control of those teams in the hands of the few majority investors in the league.

All of this played out against the backdrop of an antitrust challenge to the league's system of allocating players and setting their salaries. In 1997, several players filed suit against the league, claiming that it conspired with its investor-operators to violate the Sherman Antitrust Act by agreeing not to compete for player services.³⁷ Ultimately, the First Circuit rejected these claims in *Fraser v. Major League Soccer*.³⁸ Although the league had raised its single-entity status to defend against the claim, the court ultimately found that it did not need to reach that question because it concluded that the players had not proven that the league was able to exercise the market power necessary to sustain the claim.³⁹

33. *Id.* at 53-54.

34. WEILER ET AL., *supra* note 31, at 290.

35. Mathias, *supra* note 30, at 222.

36. Jack Bell, *Major League Soccer Eliminates Two Teams*, N.Y. TIMES (Jan. 9, 2002), <http://www.nytimes.com/2002/01/09/sports/soccer-major-league-soccer-eliminates-two-teams.html> [<https://perma.cc/XZB7-7V2R>].

37. *Fraser v. Major League Soccer, L.L.C. (Fraser I)*, 97 F. Supp. 2d 130, 132-33 (D. Mass. 2000).

38. *Fraser II*, 284 F.3d at 55-56.

39. *Id.* at 60-61.

What is perhaps most notable about the First Circuit's opinion in *Fraser* is that it cast doubt on whether MLS was actually operating as a single-entity for purposes of the antitrust defense. The court suggested that MLS and its investor-operators comprised "a hybrid arrangement, somewhere between a single company (with or without wholly owned subsidiaries)," which the Supreme Court had previously acknowledged as not implicating Section 1 of the Sherman Act,⁴⁰ and "a cooperative arrangement between existing competitors," which might still be subject to antitrust scrutiny.⁴¹

The weakening of the single entity structure observed by the court in *Fraser* continued in its aftermath. The number of investor-operators diversified and the value of the non-MLS controlled revenues grew from sources such as soccer-specific stadiums and local broadcasting deals. Arguably, the cumulative effect of these changes has been to eviscerate the single-entity defense to a potential antitrust challenge.⁴² Nevertheless, the one "key feature of Rothenberg's original design" that remains in place is the league's control over the player acquisition and transfer process.⁴³

II. MAJOR LEAGUE SOCCER'S ROSTER RULES

One might think that such a centralized scheme would make the transfer rules quite simple. The reality, however, has been quite the opposite. Describing Major League Soccer's rules is complicated both because the rules are subject to numerous exceptions and special conditions and because they are not always spelled out clearly in any publicly available text, or they change frequently, leaving observers to learn of them only in the context of specific transactions. Indeed, the "MLS Roster Rules and Regulations" document provided on the MLS website is merely a summary description of the rules made available for public consumption. It is not a document containing the "official" rules, in a technical sense, or at least the exact language of those rules, which one source has described as "tucked away in MLS's office and . . . not publicly available."⁴⁴ Nevertheless, even de-

40. *Id.* at 58 (citing *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752 (1984)).

41. *Id.*

42. Tyler A. Coppage, Comment, *Taking the Training Wheels Off MLS: Why the Single Entity Antitrust Exemption Should No Longer Apply*, 25 MARQ. SPORTS L. REV. 545, 558-61 (2015); Mark W. Lenihan, Comment, *Major League Soccer Scores an Own Goal: A Successful Joint Venture Attains Market Power in an International Sport*, 62 DEPAUL L. REV. 881, 893 (2013).

43. WEILER ET AL., *supra* note 31, at 291.

44. Kevin O'Riordan, *What's Wrong with MLS, If Anything? (Part I, Understanding Roster Rules)*, BUS. OF SOCCER (Jan. 20, 2014), <http://www.businessofsoccer.com/2014/01/20/whats-wrong-with-mls-if-anything-part-i-understanding-roster-rules/> [https://perma.cc/53KY-S6PX]. The Collective Bargaining Agreement between Major League Soccer and the Major League Soccer Players Union contains language which has

scribing the basic contours of the rules and their evolution illustrates the complexity of the entire system.

A. Roster and Salary Rules

1. General

An MLS team roster consists of a maximum of twenty-eight players and is broken up into two parts.⁴⁵ The top twenty players on an MLS team's roster comprise the "Senior Roster." The salaries for those Senior Roster players count against the "Salary Budget" set and funded by the league, which effectively operates as the base of a salary cap that is augmented for individual teams under a variety of circumstances discussed below. In 2017, the Salary Budget for these twenty Senior Roster players stood at \$3.845 million, although teams may leave roster spots nineteen and twenty unfilled in order to stretch their budget a bit farther on a per player basis. Even with that allowance, however, the maximum salary a player can be paid under the Salary Budget was \$480,625 in 2017. The salaries of players occupying spots twenty-one through twenty-four (the "Supplemental Roster" players) and spots twenty-five through thirty (the "Reserve Roster" players) are not counted against a team's Salary Budget.⁴⁶ Nevertheless, teams are not free to pay those players whatever they please. In 2017, the minimum annual salary for players occupying spots twenty-one through twenty-four was \$65,000 and the minimum for players occupying spots twenty-five through thirty was \$53,000.⁴⁷ Moreover, any player occupying one of the last four roster spots must be under the age of twenty-five as of the start of the calendar year in which that season commences.

legal effect and is written as such, but it only covers some of the relevant rules. *See* Collective Bargaining Agreement Between Major League Soccer and Major League Soccer Players Union February 1, 2015 – January 31, 2020 (Feb. 1, 2015) [hereinafter *MLS Collective Bargaining Agreement*], <https://mlsplayers.org/wp-content/uploads/2017/04/Collective-Bargaining-Agreement-February-1-2015.pdf> [<https://perma.cc/H3UP-V4G3>].

45. Except as otherwise noted, these rules are derived from *2017 Roster Rules and Regulations*, *supra* note 2. The 2017 Roster Rules and Regulations eliminated identifying roman numerals and letters for section headings and subparts. Therefore, the citations to the Roster Rules and Regulations will include parentheticals with the section or heading language to serve as identifiers.

46. The twenty-ninth and thirtieth roster spots did not exist under the 2016 rules, but they were added for the 2017 season and can only be occupied by what are called "Homegrown" players. Ben Valentine, *MLS Adds New Roster Spots and Money for Homegrown Players*, GOAL (Feb. 28, 2017), <http://www.goal.com/en-us/news/66/united-states/2017/02/28/33156432/mls-adds-new-roster-spots-and-money-for-homegrown-players> [<https://perma.cc/5Z64-M4K7>]. For more on homegrown players, see *infra* text accompanying notes 97-113.

47. *2017 MLS Roster Rules and Regulations*, *supra* note 2 ("Off-Budget: Supplemental and Reserve Rosters").

2. Exceptions

(a) International Roster Spots

In addition to the numerical and salary restrictions on eligibility for an MLS roster, there are also restrictions based on citizenship or visa status. At each team's inception, it is allocated eight "International Roster Spots."⁴⁸ For American-based teams, these are reserved for players who do not at least have a U.S. Green Card or who have not yet become naturalized citizens.⁴⁹ The International Roster Spots are tradable, though, so that at any one time a team may have a limit of more or less than eight such spots.⁵⁰ Such trades are often time-limited, which means that the acquiring team may obtain another team's International Roster Spot for the time of a particular player's contract or less, after which the spot reverts to the original team.⁵¹

Although the concept of limiting sports for foreign players to bolster the development of domestic talent is not uncommon—it most notably exists in the English Premier League, in part because of immigration restrictions, and the English Football Association has proposed to further restrict foreign access⁵²—it still manages to generate controversy in MLS. One reason is geography. The fact that MLS operates in both the U.S. and Canada makes it more difficult to define an International Roster Spot than it is in a league that operates wholly within a single nation's borders. For example, with the three teams based in Canada—Toronto FC, Montreal Impact, and Vancouver Whitecaps—both U.S. and Canada players count as domestic players, while on the U.S.-based teams only U.S. players count as domestic players. Canadian teams, however, must have at least three Canadian domestic players on their rosters. In 2014, Don Garber, the MLS commissioner, indicated that a possible change to the rules was

48. *Id.* ("Player Categories on the Roster – Domestic/International").

49. Wendy Thomas, *MLS Allure: Why Wages Are Only Part of the Story*, AM. SOCCER NOW (Sept. 14, 2015, 7:30 PM), <http://americansoccernow.com/articles/mls-allure-why-wages-are-only-part-of-the-story> [https://perma.cc/HD5A-MCH6].

50. *2017 MLS Roster Rules and Regulations*, *supra* note 2 ("Player Categories on the Roster – Domestic/International").

51. *See, e.g.*, Kurt Austin, *Sporting KC Adds Allocation Money Via Trade with Colorado*, SPORTING KAN. CITY (Aug. 7, 2015, 1:31 PM), <http://www.sportingkc.com/post/2015/08/07/sporting-kc-adds-allocation-money-trade-colorado> [https://perma.cc/YZP7-PYN2] (describing Sporting KC's trade of an International Roster Spot to Colorado through December 15, 2015, meaning it reverted back to Sporting KC for the 2016 season).

52. Binyamin Appelbaum, *Harry Kane, Globalization and the Push to Limit Foreign Players in the Premier League*, N.Y. TIMES (Apr. 1, 2015) at A3, http://www.nytimes.com/2015/04/02/upshot/globalization-under-attack-on-the-soccer-field.html?_r=0 [https://perma.cc/2E3L-WJ9X]; PA Sport, *England FA Seeks Tougher Rules for Foreign Players to Obtain Work Permits*, ESPN FC (Mar. 23, 2015), <http://www.espnfc.us/barclays-premier-league/story/2363598/england-fa-seek-tougher-rules-for-work-permits-for-foreign-players> [https://perma.cc/85RX-N6WK].

under study,⁵³ including a potential shift to a minutes played regime rather than a roster spot regime. Part of the concern expressed by the Canadian Soccer Association was that the then-current rules, by not counting Canadian players as domestic players on U.S.-based MLS teams, were artificially holding back their development, even though those players had an advantaged position with the Canada-based MLS teams.⁵⁴ Ultimately, MLS adopted a rule classifying Canadian players as domestic, but only if they qualify as a Homegrown player, become a member of an MLS youth academy or a Canadian Approved Youth Club before the year in which they turn 16, and sign their first contract with an MLS team or an MLS team's USL affiliate club.⁵⁵

A second source of controversy has been over the historic lack of transparency regarding who actually occupies these International Roster Spots for each team and how many such spots remain available. Historically, teams have not announced when a player received his Green Card or otherwise moved from domestic to international status. Although fans tried to track this information on a dedicated Wikipedia page,⁵⁶ it was far from official. Only recently did MLS start to reveal this information on its official webpage.⁵⁷

(b) *Designated Players*

The most prominent exception to the basic salary rules is that each team is permitted to sign up to three "Designated Players" or "DPs." The concept originated when the LA Galaxy pursued an opportunity to sign former Manchester United star David Beckham in 2006, a player who could not possibly be secured for an amount that would fit within the Salary Budget.⁵⁸ Previously, the league had paid for a few above-maximum roster players—such as Landon Donovan, Freddy Adu, Carlos Ruiz, and Eddie Johnson—out of central funds.⁵⁹

53. Steven Sandor, *Garber Hints That Canadian-Player Rules in MLS May Change: Why We Need to Look at Minutes Played, Not Roster Spots*, THE 11 (July 15, 2014), <http://association4614.rssing.com/browser.php?indx=69157879&item=1> [<https://perma.cc/PT6P-Z8BJ>].

54. *Id.*

55. Ridge Mahoney, *Canada: MLS Broadens Parameters for Players*, SOCCER AM. DAILY (Dec. 1, 2016, 1:34 AM), <http://www.socceramerica.com/article/71424/mls-moves-league-broadens-parameters-for-canadian.html?print> [<https://perma.cc/4T7B-PSGH>].

56. *MLS International Roster Slots*, WIKIPEDIA, https://en.wikipedia.org/wiki/MLS_International_Roster_Slots [<https://perma.cc/4CGJ-3PSJ>].

57. *2017 MLS Players*, MLS SOCCER, <https://www.mlssoccer.com/players> [<https://perma.cc/F9U8-XC6N>].

58. Frank Dell'Apa, *MLS Approves the 'Beckham Rule'*, BOSTON GLOBE (Nov. 12, 2006), http://www.boston.com/sports/articles/2006/11/12/mls_approves_the_bekham_rule/ [<https://perma.cc/WGH5-98B6>].

59. Robert M. Bernhard, *MLS' Designated Player Rule: Has David Beckham Single-Handedly Destroyed Major League Soccer's Single-Entity Antitrust Defense?*, 18 MARQ. SPORTS L. REV. 413, 426 n.108 (2008); *MLS Chief Backs 'Beckham Rule'*, WASH. TIMES

Under the “Beckham Rule,” as it was known, teams could formally pursue such high-priced players, but the investor-operators were on the hook individually for the excess amount.⁶⁰ Although critics charged that the Beckham rule and the grandfathering of the former over-budget players from the one DP rule—most notably Landon Donovan—was another example of Galaxy favoritism,⁶¹ every team in the league had at least one DP on its roster as of the start of the 2015 season, and there were forty-seven in total in the league, up from fifteen five years earlier.⁶²

Since 2006, the number of permitted Designated Players has expanded from one to three. For players over the age of twenty-three, the player carries the maximum salary budget charge of \$436,250 if he starts the year with the team, while bearing half that much if he arrives in the summer, with the investor-operator picking up the tab for the rest of his salary. More recently, MLS created a “young” Designated Player category. If the player is twenty-one to twenty-three years old, however, his budget charge is \$200,000, and if he is twenty years old or younger, his budget charge drops to \$150,000. While teams may have a maximum of three Designated Players, for players age twenty-three and older, they must purchase the third spot for an annual fee of \$150,000 that effectively operates as a tax because it is distributed to all the teams that do not have three Designated Players. Moreover, unlike International Roster Spots, Designated Player spots are not tradable, although this was not always the case. Originally, a team could trade for a second DP slot, which the New York Red Bulls did when it acquired a DP slot from Chivas USA almost three weeks after the new rule was announced.⁶³

(c) *Allocation Money*

In addition to the Designated Player rule, there are a variety of mechanisms available to augment a team’s player salaries beyond the Salary Budget Charge and to increase an individual player’s compensation beyond the maximum salary. First, teams can “buy down” their budget charge through the use of what is called “Allocation Money.” Allocation Money is budget space allotted to a team that

(May 13, 2006), <http://www.washingtontimes.com/news/2006/may/13/20060513-120445-4904r/> [<https://perma.cc/86SB-MX9S>].

60. Bernhard, *supra* note 59, at 428.

61. Kartik Krishnaiyer, *Grandfathering in Designated Players Smacks of Favoritism*, WORLD SOCCER TALK (Dec. 5, 2007), <http://worldsoccertalk.com/2007/12/05/grandfathering-in-designated-players-smacks-of-favortism/> [<https://perma.cc/P9X7-EDLS>].

62. Gabriel De Los Rios, *Class of 2015: The 47 Designated Players in MLS*, MLS SOCCER (March 13, 2015, 3:52 PM), <http://www.mlssoccer.com/post/2015/03/13/class-2015-47-designated-players-mls> [<https://perma.cc/S9NX-C4YD>].

63. Bernhard, *supra* note 59, at 426 n.111.

can be used to make up the difference between the team's actual Salary Budget Charge and the maximum permitted Salary Budget Charge. A team can buy down the budget charge of Designated Player as well with allocation money, but only to an amount not less than \$150,000.⁶⁴

There are a number of circumstances in which teams are provided Allocation Money. First, regardless of a team's performance the prior year, every team receives an annual allotment of Allocation Money. In 2017, this amounted to \$200,000 per team.⁶⁵ Second, teams receive Allocation Money in certain circumstances based upon their performance the prior year. These include both the failure to perform by not qualifying for the MLS playoffs and performing well by qualifying for the CONCACAF Champions League, which potentially involves carrying a larger and deeper roster to be able to play in the separate qualifying and elimination rounds involved with that tournament.

There are also circumstances in which a team can garner additional Allocation Money without meeting any performance criteria. The most common example is when a team transfers a player to a non-MLS team for a transfer fee, as opposed to letting them leave at the expiration of their contract on a free transfer. Although MLS never specifies the precise amount of allocation money that is made available, the maximum amount is reportedly \$650,000 under what operates as a two-thirds/one-third split between the selling team and the league for most players.⁶⁶ The one exception to this allocation is that if a club transfers a Designated Player to a club in another league, the club is entitled to receive an amount sufficient to recoup its investment in the Designated Player before any amount is shared with the league.⁶⁷

64. 2017 *MLS Roster Rules and Regulations*, *supra* note 2 ("Allocation Money – Buy-Down").

65. *Id.* ("Allocation Money – General Allocation Money").

66. Brian Lewis, *MLS Expands Roster, Loosens Academy Rules*, N.Y. POST (Apr. 8, 2010, 11:09 PM), <http://nypost.com/2010/04/08/mls-expands-roster-loosens-academy-rules/> [<https://perma.cc/9GLB-Z8ZN>] (noting that the normal 2/3 and 1/3 split is changed to a 3/4 and 1/4 split in the case of a Home Grown Player); *MLS Roster Changes and Transfer Fees*, VIPERS NEST (Apr. 8, 2010, 8:34 PM), <http://www.thevipersnest.com/2010/04/mls-roster-changes-and-transfer-fees.html> [<https://perma.cc/24TD-MYNT>] (noting that in the case of Generation Adidas players and non-Homegrown players in the Superdraft, the 2/3 and 1/3 split only applies to players in the league 3+ years, with a 50-50 split for players with two years of service and a 1/3 and 2/3 split for players with only one year of service). It is not clear whether those splits still apply because they are not described in the MLS Rosters Rules and Regulations posted on the league website.

67. Todd Dybas, *MLS Now Allowing Up to Three Designated Players Per Club*, SOUNDERS FC BLOG (Apr. 1, 2010, 10:06 AM), <http://blog.seattlapi.com/sounders/2010/04/01/mls-now-allowing-up-to-three-designated-players-per-club/?source=pimail> [<https://perma.cc/4WQW-AN8J>].

Finally, teams receive Allocation Money for a reason other than meeting performance criteria when an expansion team enters the league. In that circumstance, the expansion team gets Allocation Money to help it stock its roster, and all of the teams get an equal amount of Allocation Money that presumably operates as a mechanism to distribute at least a portion of the expansion fee throughout the league. Additionally, any team that loses a player in the expansion draft receives additional Allocation Money to help replace that player.

(d) *Targeted Allocation Money*

Finally, a special form of Allocation Money is called “Targeted Allocation Money” or “TAM.” This refers to amounts allocated to teams to enable them to do certain specified things: (1) sign or re-sign a player whose salary exceeds the maximum Salary Budget Charge; (2) buy down the budget charge of an existing Designated Player to a level that would make him no longer a Designated Player, but only if the team then signs a new Designated Player to an amount equal to or greater than the player he replaced as a Designated Player; or (3) sign a Homegrown player to his first professional contract, but TAM can only be used for up to \$200,000 of that salary. Called a “dash of chaos” when introduced on July 8, 2015,⁶⁸ the league at the time provided \$100,000 per year in TAM for a period of five years, but it allowed teams to use all \$500,000 in one transaction.

Although changes to the Designated Player program were rumored long before the summer of 2015,⁶⁹ the popular perception is that the whole concept was invented to enable the LA Galaxy, which already had three Designated Players—Robbie Keane, Steven Gerrard, and Omar Gonzalez—to sign Mexican national team star Giovani Dos Santos to a Designated Player contract.⁷⁰ The Galaxy used TAM to buy down Gonzalez’s DP status and Salary Budget Charge, which allowed them to sign Dos Santos.⁷¹

68. Heath Waddingham, *A Dash of Chaos: MLS Introduces “Targeted Allocation” Roster Rule*, TOTAL-MLS.COM (July 9, 2015, 5:13 PM), <http://total-mls.com/2015-articles/a-dash-of-chaos-mls-introduces-targeted-allocation-roster-rule.html> [<https://perma.cc/PRL5-FQ3Z>].

69. See Jacob Landsberg, *Rumored DP Rule Change Would Allow Sounders to Splash Some Cash*, SOUNDER AT HEART (May 15, 2015, 11:00 AM), <http://www.sounderatheart.com/2015/5/15/8611815/potential-dp-rule-changes-and-how-the-sounders-can-splash-some-cash> [<https://perma.cc/6EA6-SNLX>].

70. Kevin Brown, *The LA Galaxy Signed Giovani dos Santos Because Rules Are for Chumps*, FUSION (July 15, 2015, 1:04 PM), <http://fusion.net/story/167406/giovani-dos-santos-signs-with-la-galaxy-mls/> [<https://perma.cc/G7MP-CW4A>]; Jared E. Young, *MLS Single-Entity and the Issue of Trust*, BROTHERLY GAME (Feb. 3, 2016, 6:00 AM), <http://www.brotherlygame.com/2016/2/3/10819230/mls-single-entity-and-the-issue-of-trust> [<https://perma.cc/T5PY-DG35>].

71. Peter Muller, *MLS’s Targeted Allocation Money Fund Is a Flawed Approach to Growth*, WORLDSOCCERTALK.COM (July 9, 2015), <http://worldsoccertalk.com/2015/07/09/>

Targeted Allocation Money is a “use it or lose it” type of Allocation Money, since teams had to either use the \$100,000 in the year of grant or the year following, or trade it to another team. Coupled with the requirement that a team may use it only to acquire or re-sign a DP player, this put the onus on teams to take advantage of the opportunity rather than merely defraying their own expenses.

At the end of the 2015 season, MLS announced that it was providing an additional grant of \$800,000 in TAM for each of the next two years, but it limited this grant to be used on signings of players making between the maximum Salary Budget Charge and \$1 million.⁷² Although TAM cannot be used in combination with general Allocation Money, it can be used to buy down a player’s Salary Budget Charge to as low as \$150,000, which effectively operates to free up general Allocation Money for non-DP signings.⁷³ An additional \$400,000 was added after the 2016 season, bringing the total amount of TAM provided to each team to \$1.2 million.⁷⁴

B. Player Acquisitions—External

1. Allocation

Major League Soccer’s teams were originally populated in part through an allocation process. Before the inaugural 1996 season, the league allocated four “marquee” players to each of the ten teams in the league.⁷⁵ Subsequently, teams filled out their rosters through a draft in which they each select sixteen players from a group of players identified by the league.⁷⁶

Although the allocation process is no longer quite so centrally controlled by the league, it does still exist to ensure a fair allocation of marquee players. Currently, the league identifies “marquee” players to include: (1) certain U.S. Men’s National Team players, (2) elite youth U.S. National Team players, and (3) former MLS players who return to MLS after joining a non-MLS team for a transfer fee great-

mls-targeted-allocation-money-fund-is-a-flawed-approach-to-growth/ [https://perma.cc/8QQM-EFQG].

72. *MLS Announces \$37 Million Investment in Targeted Allocation Money, Homegrown Player Funds for 2016-17*, MLS SOCCER (Dec. 9, 2015, 2:20 PM), <http://www.mlssoccer.com/post/2015/12/09/mls-announces-37-million-investment-targeted-allocation-money-homegrown-player-funds> [https://perma.cc/9W45-XFM2].

73. *Id.*

74. *MLS Announces Increase in Targeted Allocation Money for 2017*, MLS SOCCER (Dec. 9, 2016, 9:30 PM), <http://www.mlssoccer.com/post/2016/12/09/mls-announces-increase-targeted-allocation-money-2017> [https://perma.cc/GK6Q-HULA].

75. *MLS History: 1996 Season Recap*, MLS SOCCER, <http://www.mlssoccer.com/history/season/1996> [https://perma.cc/B6AU-UG4T].

76. *Id.*

er than \$500,000.⁷⁷ Teams are ranked each year in reverse order of their finish in the league. They may trade their Allocation Ranking with another team, but the order resets at the end of the season. When one of the players on the list becomes available at a price agreed to by the player and the league, each team in order of their Allocation Ranking is given an opportunity to claim the player at that price. If a team claims the player, then their Allocation Ranking drops to the end of the list.

One of the principal complaints about this system in the past was trying to identify which players were subject to the allocation draft and which players could be signed outside of that process. As with other rules, not only did the lack of transparency frustrate observers and players seeking to choose their own team, but it also appeared to disguise favoritism in player allocations.⁷⁸ For example, U.S. Men's National Team veteran Clint Dempsey apparently was able to avoid the allocation process when he moved from Tottenham back to MLS to play for the Seattle Sounders.⁷⁹ The original explanation was that Dempsey was a Designated Player signing and therefore not subject to selection according to the Allocation Ranking,⁸⁰ but this was proven false almost immediately when another U.S. Men's National Team player, Maurice Edu, was forced to go to the Philadelphia Union under the Allocation Ranking despite also commanding a Designated Player contract.⁸¹ Although the language in the rules was subsequently altered to make clear that the allocation process didn't apply to "Designated Players of a certain threshold," the "threshold" was undefined, and the mechanism for selecting between competing teams—both willing to offer the requested amount—lead to controversies over the Designated Player signings of both Jermaine Jones by New England and Jozy Altidore by Toronto FC.⁸² In the case of Jones, the infamous "Blind Draw" between New England and Chica-

77. 2017 *MLS Roster Rules and Regulations*, *supra* note 2 ("Player Acquisition Mechanisms – Allocation Process – Allocation Ranking List").

78. Brown, *supra* note 70.

79. Richard Farley, *The Dempsey Route: Allocation in Focus, but Another "Rule Change" a Bigger Issue for MLS*, NBC SPORTS (Aug. 5, 2013, 9:40 PM), <http://soccer.nbcsports.com/2013/08/05/clint-dempsey-seattle-sounders-transfer-news-latest-major-league-soccer/> [https://perma.cc/99JM-H843].

80. *Id.*

81. Eric Goldstein, *Philadelphia Union Sign Midfielder, USMNT's Maurice Edu*, SOUTH JERSEY TIMES (Jan. 27, 2014, 5:50 PM), http://www.nj.com/philadelphia-union/index.ssf/2014/01/philadelphia_union_sign_midfie.html.

82. Justin Jerkins, *The MLS Allocation Order* Is Dead*, DYNAMO THEORY (Aug. 27, 2014, 11:30 AM), <http://www.dynamotheory.com/2014/8/27/6068223/the-mls-allocation-order-is-dead> [https://perma.cc/HFS7-LS3U] (discussing the Jones signing); Eugene Rupinski, *The Allocation Ranking Fallacy*, BROTHERLY GAME (Jan. 21, 2015, 6:00 AM), <http://www.brotherlygame.com/2015/1/21/7558595/jozy-altidore-major-league-soccer-the-allocation-ranking-fallacy> [https://perma.cc/BB44-PRSV] (discussing the Altidore signing).

go to decide who would be allocated his rights subjected the league to particular ridicule.⁸³ To at least partially combat those complaints, MLS started publishing a list of prospective players subject to the allocation process each year,⁸⁴ which removed doubt about who was subject to the process regardless of salary.

2. *SuperDraft*

The “SuperDraft,” appears to be so-named in order to distinguish it from the bevy of other drafts that MLS uses to allocate or reallocate players. Although it traces its roots back to the draft originally designed to stock teams with players beyond the first four allocated marquee players, the SuperDraft currently is limited to selecting players from college, plus a few non-collegiate international players,⁸⁵ some of whom have in the past been the product of one or more regional Caribbean combines held before the combine for college players and then are invited to join the collegiate combine.⁸⁶ As in other American sports leagues, teams that do not qualify for the prior year’s playoffs select in reverse order of their point finish, with the remaining slots filled according to the round in which the team was eliminated in the playoffs and then the season point total of the teams within each of those rounds.

With the decline of college soccer as a viable means of development, commentators have routinely mentioned the declining relevance of the SuperDraft.⁸⁷ Others have advocated abolishing it alto-

83. Goff, *supra* note 4.

84. Brian Straus, *MLS Sets Fixed List of Players for Allocation Order Among New '15 Rules*, SPORTS ILLUSTRATED (May 1, 2015), <http://www.si.com/planet-futbol/2015/05/01/mls-rules-regulations-cba-allocation-order-discovery> [https://perma.cc/U4QU-SEY6].

85. One of the most prominent examples of non-collegiate international players signed by the league, presumably contingent on being selected by a team in the SuperDraft, was John Rooney, the brother of Manchester United striker Wayne Rooney. See Leander Schaerlaeckens, *Just Another Rooney*, ESPN (Jan. 17, 2011, 12:34 PM), http://espn.go.com/sports/soccer/news/_/id/6015448/wayne-rooney-brother-john-starts-mls-career [https://perma.cc/ZV95-HPEN].

86. Kyle McCarthy, *MLS Player Combine Reflects Changing Landscape Within Domestic Player Development*, FOX SPORTS (Jan. 9, 2015, 10:30 AM), <https://www.foxsports.com/soccer/inside-mls/story/mls-player-combine-changing-landscape-preview-010915> [https://perma.cc/F8W5-VEVL]; *19 Players Invited to 2015 Caribbean Player Combine*, MLS SOCCER (Dec. 31, 2014), <http://pressbox.mlssoccer.com/content/19-players-invited-2015-caribbean-player-combine> [https://perma.cc/5G9W-URNY]; *2015 MLS Combine to Be Held Across Three Islands*, CFU FOOTBALL (Dec. 7, 2015), <http://cfufootball.org/index.php/men-s-u20/9763-2015-mls-combine-to-be-held-across-three-islands> [https://perma.cc/SPH8-MWPG].

87. See Jeff Carlisle, *Major League Soccer’s Player Combine, SuperDraft, Inspires Debate*, ESPN FC (Jan. 13, 2016), <http://www.espnfc.com/major-league-soccer/19/blog/post/2786582/mls-debate-rages-over-player-combine-superdraft> [https://perma.cc/4MF3-WHVS]; Brian Straus, *As MLS Grows, the SuperDraft Becomes Less Relevant*, SPORTING NEWS (Jan. 14, 2012), <http://www.sportingnews.com/soccer/news/445648-as-mls-grows-the-superdraft-becomes-less-relevant> [https://perma.cc/E5PM-VBE8?type=image]; see also Paul Gardner, *The MLS*

gether, in part because of its diminishing importance, and in part, because it is being supplanted by youth academies operated by the teams directly.⁸⁸ One reason it persists is that American sports consumers remain attracted to the annual spectacle of a college draft.⁸⁹ More importantly, perhaps, is that as long as at least some inexpensive talent emerges through the college system, MLS appears to want to allocate that talent through some mechanism other than open market bidding.⁹⁰ That does not mean, however, that the SuperDraft is entirely free from such influences. The Generation Adidas program is one example.

3. *Generation Adidas Program*

Starting in 1997 with the so-called Nike Project 40 and continuing with the Generation Adidas program, certain players are signed by the league prior to the SuperDraft as a means of inducing them to play with MLS rather than to stay in college or look overseas.⁹¹ They receive guaranteed contracts and education stipends, as well as salaries that often pay them more than they would receive as an entry-level draftee.⁹² To be eligible for the Generation Adidas program, a player must be an underclassman in college or a youth national team player.⁹³ One attraction to a team in selecting a Generation Adidas player is that they are automatically considered Supplemental Roster players, and therefore, are not counted against the Salary Budget, regardless of where their salary would actually place them in the

PseudoDraft and Other Obstacles That Latino Americans Face in American Soccer, SOCCER AM. (Jan. 13, 2016, 11:24 PM), <http://www.socceramerica.com/article/67295/the-mls-pseudodraft-and-other-obstacles-that-latin.html> [https://perma.cc/QNS8-3HS6] (arguing that the SuperDraft is irrelevant in part because it largely leaves out Latino players).

88. Leander Schaerlaeckens, *Why MLS Should Abolish the SuperDraft*, FC YAHOO (Jan. 14, 2016, 3:07 AM), <http://sports.yahoo.com/blogs/soccer-fc-yahoo/why-mls-should-abolish-the-superdraft-080724364.html> [https://perma.cc/K9CX-AN7C].

89. *Id.* According to former league executive and current Chicago Fire GM Nelson Rodriguez, “it’s our most highly trafficked day on MLSSoccer.com.” Carlisle, *supra* note 87 (quoting Rodriguez).

90. *Id.*

91. *2017 MLS Roster Rules and Regulations*, *supra* note 2 (“Player Acquisition Mechanisms – SuperDraft”). Other Seniors are signed to a league contract before the SuperDraft for an amount more than Seniors drafted and signed only after the SuperDraft. This process, which is not part of the Generation Adidas program, is presumably designed with similar aims because a player signing before the draft agrees to relinquish their rights to consider signing with other U.S. leagues or with foreign-based teams. Paul Kennedy, *MLS SuperDraft: 2016 Viewing Guide*, SOCCER AM. (Jan. 14, 2016, 12:45 AM), <http://www.socceramerica.com/article/67317/mls-superdraft-2016-viewing-guide.html> [https://perma.cc/XLR4-PD3T].

92. Carrie W. LeCrom et al., *The Impact of Nike Project 40/Generation Adidas Players on Major League Soccer*, 4 J. SPORT ADMIN. & SUPERVISION 32, 33-34 (2012).

93. *2017 MLS Roster Rules and Regulations*, *supra* note 2 (“Player Categories on the Roster – Generation Adidas & Generation Adidas Canada”).

rankings of player salaries on the team.⁹⁴ A player then “graduates” from the Generation Adidas program after reaching certain unspecified performance targets that appear to include appearances, minutes played, and goals scored.⁹⁵

Although MLS continues to identify and sign players through the Generation Adidas program, the effectiveness in identifying talent is questionable. In one study, the authors found that the differences between Nike Project 40/Generation Adidas players and other players was negligible, with the only statistically significant advantages in age, assists, and ejections.⁹⁶ Putting aside sample size issues with that particular study, these results may help explain the decline in the number of players signed to the Generation Adidas program and the rise of alternative paths that bypass college and the SuperDraft altogether.⁹⁷

The case of Jeremy Ebobisse is illustrative of both the declining influence of Generation Adidas and the league’s willingness to be flexible in its rules. Ebobisse was a Duke University striker signed to a contract with MLS. The problem was that he signed a sponsorship agreement with Nike before signing with MLS, which made him ineligible for Generation Adidas under the terms of the league’s sponsorship agreement with Adidas.⁹⁸ Rather than risk losing him, though, or making him less attractive in the SuperDraft than other comparable players, the league was reportedly considering creating a special roster class that mimicked the Generation Adidas benefits.⁹⁹

4. *Homegrown*

To the extent that the college route to MLS is on the wane, it is the Youth Academy route that is taking its place. Under this system, players may be exclusively signed as “Homegrown” players by the

94. *Id.*

95. Earl Reed, *MLS '13: Is Generation Adidas Working?* WORLD SOCCER TALK (Feb. 22, 2013), <http://worldsoccertalk.com/2013/02/22/mls-13-is-generation-adidas-working/> [https://perma.cc/Y2A7-FYYK].

96. LeCrom et al., *supra* note 7, at 38.

97. For the decline in the influence of the SuperDraft, see *supra* note 82 and accompanying text. For the decline in the number of Generation Adidas players, see Ben Roth, *A Look at the 2016 Generation Adidas Signings*, COLLEGE SOCCER NEWS (Jan. 10, 2016, 6:51 PM), <http://collegesoccernews.com/index.php/articles/897-a-look-at-the-generation-adidas-signings-by-ben-roth> [https://perma.cc/E34E-J6PX].

98. Steven Goff, *Duke’s Jeremy Ebobisse Signs with MLS*, WASH. POST (Aug. 15, 2016), https://www.washingtonpost.com/news/soccer-insider/wp/2016/08/15/dukes-jeremy-ebobisse-signs-with-mls/?utm_term=.990b924b6897#comments [https://perma.cc/ETH7-ZR6H].

99. Ives Galarcep, *MLS Talking Points: The Market for Landon Donovan, the Next Crop of Homegrown Players and More*, GOAL (Dec. 30, 2016, 2:49 AM), <http://www.goal.com/en-us/news/1110/major-league-soccer/2016/12/30/30983822/mls-talking-points-the-market-for-landon-donovan-the-next> [https://perma.cc/K9FS-8AAB].

team that developed them.¹⁰⁰ This means that they would not be subject to any further process of allocation among the other MLS teams. There is no limit to the number of Homegrown players a team may sign to its roster.¹⁰¹ The only eligibility criteria specified in the rules are that “the player [must have] been a member of a club’s youth academy for at least one year and . . . met the necessary training and retention requirements.”¹⁰² This rule has often been flexibly applied in order to sign an individual prospect, though, leading to charges of favoritism. For example, the Los Angeles Galaxy signed Jose Villarreal to a Homegrown contract before he had finished a year with the club’s academy, and MLS simply required that he complete that year of development after signing the contract, without opening up Villarreal to other clubs.¹⁰³

Some have reported that there are specific numerical requirements for Homegrown eligibility, such as a combination of eighty practice and game sessions before the player leaves for college.¹⁰⁴ To retain this Homegrown player status, they have to be registered as a Homegrown player before they enter college or are selected as a member of a U17 or older U.S. Youth National Team, although they can maintain that status if registered before college (and they participate in a minimum of thirty practice or game sessions while in college) or before their selection to a national team.¹⁰⁵ This standard, however, has been called “murky,” with youth academies supposed to record “training units” prospects log with their academy to settle disputes about whether a team should be granted exclusive rights to a player as Homegrown or whether the player should be forced to go through the draft and be available to all teams.¹⁰⁶ When confronted with disparities between the stated rules and the realities of certain players granted Homegrown

100. 2017 *MLS Roster Rules and Regulations*, *supra* note 2 (“Player Categories on the Roster – Homegrown Players”).

101. *Id.*

102. *Id.*

103. Ives Galarcep, *The MLS Wrap: Time to Stop Perpetuating the ‘Homegrown Player’ Myth*, GOAL (Sept. 29, 2014, 2:40 AM), <http://www.goal.com/en-us/news/1110/major-league-soccer/2014/09/29/5141247/the-mls-wrap-time-to-stop-perpetuating-the-homegrown-player> [https://perma.cc/Y9T7-HHTW].

104. Kyle McCarthy, *MLS Has Placed an Emphasis on Identifying, Nurturing and Signing Young Talent in Recent Years and the Flexible Application of the Home Grown Rule Adheres to That Objective*, GOAL (Jan. 9, 2012, 7:45 AM), <http://www.goal.com/en-us/news/1110/major-league-soccer/2012/01/09/2838136/monday-mls-breakdown-application-of-the-home-grown-player> [https://perma.cc/5S7N-UX58].

105. New York Red Bulls, *MLS Homegrown Policy*, <http://www.redbullsacademy.com/academy/overview/mls-homegrown-policy/> [https://perma.cc/GR5X-UZRS].

106. See Charles Boehm, *MLS Homegrown System Still Murky as Signings Stymied by Backroom Battles*, SOCCER WIRE (Dec. 17, 2015), <http://www.soccerwire.com/news/pro/mls/mls-homegrown-system-remains-murky-as-signings-hampered-by-backroom-eligibility-battles/> [https://perma.cc/3AFK-SH8Q] (describing the dispute over the homegrown status of Brandon Allen and other New York Red Bull Academy products).

status, teams admit that certain exceptions are granted, although no one identifies the parameters of those exceptions.¹⁰⁷

In a twist on the rule that further stretches the concept, teams can develop a player anywhere in the country where they set up a youth academy or establish an affiliate relationship with a local club. For example, the Galaxy's claim to Villarreal was partially a result of their affiliate relationship with his former club.¹⁰⁸ MLS, however, rejected a similar claim by NYCFC to Jack Harrison, a Wake Forest player who had been at a Manhattan youth soccer club for three years before NYCFC commenced existence and subsequently established an affiliate relationship with that club.¹⁰⁹

To avoid a free-for-all battle between the teams over youth players, MLS limits the players to whom a team may claim Homegrown status. To have exclusive rights to a player, the youth academy has to be part of the team's home territory and the player has to play in that territory for a year, rather than simply fly in for a few trainings from across the country.¹¹⁰ The territories are often quite large though. For example, while most clubs in big cities have a seventy-five mile radius to their exclusive territory, some have an entire state or even two states, including Real Salt Lake, which has both Utah and Arizona entirely within its territory.¹¹¹ Moreover, some territories are overlapping, such as when the teams occupy the same city so that the two teams' youth academies compete for the players within their shared territory.¹¹² In cases where there is no MLS team and no estab-

107. *Controversy Surrounds MLS' Home Grown Rule*, TOP DRAWER SOCCER (Feb. 8, 2012), http://www.topdrawersoccer.com/club-soccer-articles/controversy-surrounds-mls-home-grown-rule_aid23766 [<https://perma.cc/9ADH-7RKY>]; see Thad Bell, *Sporting Kansas City Claims Homegrown Rights to Josh Sargent*, THE BLUE TESTAMENT (Dec. 21, 2016, 8:43 PM), <http://www.thebluetestament.com/2016/12/21/14047792/sporting-kansas-city-claims-homegrown-rights-to-josh-sargent> [<https://perma.cc/SV4Z-4TM4>] (noting that Sporting KC was able to claim Sargent even though he had never played for their Academy team because he was from their territory and there were no other teams with competing claims, but he would still need to play for their Academy or USL team for a year to qualify for inclusion in the senior roster).

108. Josie Becker, *LA Galaxy Sign Jose Villarreal to Homegrown Player Contract*, LAG CONFIDENTIAL (Dec. 22, 2011, 3:09 PM), <http://www.lagconfidential.com/2011/12/22/2656176/la-galaxy-sign-jose-villarreal-to-homegrown-player-contract> [<https://perma.cc/49EG-RW3Z>].

109. Dave Martinez, *MLS Rejects Homegrown Claim on Harrison; NYCFC Still Pursuing*, EMPIRE OF SOCCER (Jan. 2, 2016), <http://www.empireofsoccer.com/homegrown-harrison-pursuing-43459/> [<https://perma.cc/U8DK-E3GZ>].

110. *2017 MLS Roster Rules and Regulations*, *supra* note 2 ("Player Acquisition Mechanisms – Homegrown Players Signings").

111. Eugene Rupinski & Srantz, *The Homegrown Player Rule—A New Visual Guide*, BROTHERLY GAME (Sept. 3, 2015, 6:01 AM), <http://www.brotherlygame.com/2015/9/3/9242267/homegrown-player-rule-major-league-soccer-visual-guide> [<https://perma.cc/4R5N-6KL4>].

112. Matt Pollard, *MLS 3.0: The Future of MLS Homegrown Territories*, LWS (Oct. 10, 2015), <http://lastwordonsports.com/2015/10/10/mls-3-0-mls-academy-territories/> [<https://perma.cc/P87L-BM7S>].

lished territory, a team may set up an affiliate relationship and presumably claim Homegrown status for the players it helps to develop.¹¹³

In addition to providing a team with exclusive access to a player developed in their youth Academy, Homegrown players have special budget roster rules.¹¹⁴ Previously, up to two Homegrown players were exempt from a team's Salary Budget Charge altogether.¹¹⁵ They were treated like Generation Adidas signings. As of December of 2015, all teams receive \$125,000 of allocation money to use to buy down the Salary Budget Charge of one or more Homegrown players on either the Supplemental or Reserve Roster to the minimum salary charge for each.¹¹⁶ Teams may also use up the \$200,000 of Targeted Allocation Money to sign new Homegrown players to their first MLS contract.¹¹⁷

5. *Discovery Process*

Even if a player is not subject to the Allocation process, the SuperDraft, or the Homegrown rule, it is still not a free-for-all among MLS teams to sign the player. Instead, their MLS rights are subject to what is known as a "Discovery Process."¹¹⁸ Under this system, if a player is not yet under contract to MLS, the team has to place him on its "Discovery List" before signing him.¹¹⁹ Although the name suggests the players are little known players unearthed through dedicated scouting, the Discovery Process applies even to Designated Player prospects who are well known players in foreign leagues, with caveats preventing teams without the intent or financial ability to sign a player from adding him to their Discovery Lists for hold-up value only.¹²⁰ At any one time, a team may have seven players on its Discovery List, which it can add to or subtract from continuously.¹²¹ It can sign up to six players off of its Discovery List to its Senior Ros-

113. *Id.*

114. *2017 MLS Roster Rules and Regulations*, *supra* note 2 ("2017 MLS Roster Composition – Treatment of Homegrown Players on a Club's Roster, Homegrown Player Subsidy").

115. Andrew Lewellen, *The Future of U.S. Soccer: Homegrown Players*, GRANTLAND (July 20, 2012), <http://grantland.com/the-triangle/the-future-of-u-s-soccer-homegrown-players/> [https://perma.cc/5N67-GJCB].

116. *MLS Announces \$37 Million Investment*, *supra* note 72; *2017 MLS Roster Rules and Regulations*, *supra* note 2 ("2017 MLS Roster Composition – Homegrown Player Subsidy").

117. *2017 MLS Roster Rules and Regulations*, *supra* note 2 ("Allocation Money – Targeted Allocation Money").

118. *Id.* ("Player Acquisition Mechanisms – Discovery Process").

119. *Id.*

120. *Id.* If a team seeks "to add a player . . . whom the league determines will require a significant investment," the team "must submit confirmation in writing to the league that if the league and player should reach an agreement, the club is prepared to make the necessary financial investment." *Id.* ("Player Acquisition Mechanisms – Discovery Process – Discovery Player Requests"). Even then, "[i]f the league determines that there is no realistic chance of signing the player at that time he will not be discoverable." *Id.*

121. *Id.* ("Player Acquisition Mechanisms – Discovery Process").

ter.¹²² The Discovery Lists are kept confidential, and the league does not publicly reveal whether a player is subject to a Discovery Claim.¹²³

The problem with this Discovery Process, at least until recently, is that a team could theoretically claim a player on its Discovery List without actually contacting the player, let alone trying to sign them to a contract with the league.¹²⁴ The claim could be nothing more than a gambit to secure compensation from an interested team. Although there was supposedly a process in place to ensure that a team's claim was legitimate before it could receive compensation, the standards were undefined and the whole process was called a "gray-area-laden quagmire."¹²⁵ One commentator called it an "embarrassment."¹²⁶

Because of concerns about disputed claims and locked out players under the Discovery Process, it was amended in 2015 to outline a standard dispute resolution procedure.¹²⁷ The rules continue a first-in-time rule, but offer a relief process and a set amount of compensation if another team seeks to acquire the player's rights.¹²⁸ If a team wants to sign a player who is then on another team's Discovery List, it can offer \$50,000 in Allocation Money, and the other team must either accept the offer or "make the player a genuine, objectively reasonable offer."¹²⁹

Even after the new rules were put in place, there were accusations that teams were still using Discovery Claims to effectively hold players hostage for the \$50,000 in Allocation Money or to block their signing by another team, rather than because they were genuinely interested in signing the players.¹³⁰ In one well-publicized example, Bruce

122. Geoff Gibson, *Discovery Claims Are an Embarrassment to MLS*, STUMPTOWN FOOTY (Feb. 16, 2013, 9:02 AM), <http://www.stumptownfooty.com/2013/2/16/3995274/discover-claims-embarrassment-mls-portland-timbers> [<https://perma.cc/P56U-XK67>].

123. *Major League Soccer Announces 2015 Roster Rules, Including Revised Player Acquisition Process*, MLS SOCCER (May 1, 2015, 4:06 PM), <https://www.mlssoccer.com/post/2015/05/01/major-league-soccer-announces-2015-roster-rules-including-revised-player-acquisition> [<https://perma.cc/YTC5-QYFT>].

124. Gibson, *supra* note 122.

125. Avi Creditor, *Nigel Reo-Coker and Mikael Silvestre Are Two of MLS's Newest Signings, but How They Wound up on Vancouver and Portland Sparked Questions About the League's Rules*, GOAL.COM (Feb. 26, 2013, 1:00 AM), <http://www.goal.com/en-us/news/1110/major-league-soccer/2013/02/26/3780299/avi-creditor-a-look-inside-the-mls-discovery-process> [<https://perma.cc/9SBL-2DNW>].

126. Gibson, *supra* note 122.

127. *Major League Soccer Announces 2015 Roster Rules, Including Revised Player Acquisition Process*, MLSSOCCER.COM (May 1, 2015, 4:06 PM), <http://www.mlssoccer.com/post/2015/05/01/major-league-soccer-announces-2015-roster-rules-including-revised-player-acquisition> [<https://perma.cc/C7QX-BFKC>].

128. *2017 MLS Roster Rules and Regulations*, *supra* note 2 ("Player Acquisition Mechanisms – Discovery Process – Discovery Conflict Resolution").

129. *Id.*

130. See Will Parchman, *Bruce Arena Is Hot About MLS's New Discovery Claims Process*, TOP DRAWER SOCCER (May 13, 2015), <http://www.topdrawersoccer.com/>

Arena called the New England Revolution's Discovery Claim on Sebastian Lletget to the LA Galaxy to be "a blackmail job" considering that Lletget actually trained with the Galaxy during their preseason trip to Ireland and had no apparent contact from the Revolution at the same time.¹³¹ In his case, though, the problem was that the Galaxy had filed a Discovery Claim on March 1, which was before the new collective bargaining agreement and the new Discovery Process had been ratified, and once that occurred the Discovery Claims reset, leading the Revolution to jump in line ahead of the Galaxy.¹³² A more blatant example of a strategic discovery claim was one placed on Zlatan Ibrahimović by the Philadelphia Union, whose coach admitted that it was done with an eye toward receiving the \$50,000 compensation rather than actually signing the player.¹³³ Major League Soccer reportedly invalidated the Union's claim because it apparently deemed it unlikely that the Union was going to make a "genuine, objectively reasonable offer," which only increased criticism of MLS for its lack of transparency and communication in arriving at that conclusion.¹³⁴

Even when the team with the discovery rights is genuinely interested in signing a player, problems can arise. A notable example is the dispute between DC United and Orlando City over the signing of Italian star Antonio Nocerino. DC United owned the rights to sign Nocerino by virtue of having "discovered" him, but Nocerino ultimately preferred to join his former AC Milan teammate Kaka in Orlando.¹³⁵ After much wrangling and saber-rattling about tampering, Orlando ended up acquiring Nocerino's rights from DC United for an amount of Targeted Allocation Money and Allocation Money that presumably exceeded the required \$50,000 under the rules.¹³⁶

the91stminute/2015/05/bruce-arena-is-hot-about-mlss-new-discovery-claims-process/[https://perma.cc/M676-YZMS] (discussing the signing of Sebastian Lletget).

131. *Id.*

132. *Id.*

133. Doug McIntyre, *Zlatan Ibrahimovic Discovery Claim 'Strategic' Move by Philadelphia Union*, ESPN FC (May 15, 2016), <http://www.espnfc.us/major-league-soccer/story/2873536/zlatan-ibrahimovic-discovery-claim-strategic-move-by-philadelphia-union-coach> [https://perma.cc/3TRN-YNJX].

134. Rohn Jossi, *Twelaman: Union Wouldn't Receive Compensation for Zlatan Ibrahimovic's Rights*, THE BROTHERLY GAME (May 15, 2016, 8:52 PM), <http://www.brotherlygame.com/2016/5/15/11679566/philadelphia-union-would-not-receive-compensation-for-zlatan-ibrahimovic-rights> [https://perma.cc/4T2X-ECBC].

135. Kristan Heneage, *MLS: Nocerino's Move to MLS Highlights the Continued Complexity of League Rules*, YAHOO! SPORT (UK) (Feb. 4, 2016, 3:39 PM), <https://uk.sports.yahoo.com/news/mls-nocerino-move-mls-highlights-033952969.html> [https://perma.cc/JA73-WLQ8].

136. Alicia Rodriguez, *Orlando City Sign Italian Star Antonio Nocerino After Trade with DC United*, MLS SOCCER (Feb. 18, 2016, 6:18 PM), <http://www.mlssoccer.com/post/2016/02/18/orlando-city-sign-italian-star-antonio-nocerino-after-trade-dc-united> [https://perma.cc/4XJY-P2FV].

One additional feature of the new Discovery Process is that one player on a team's roster may be classified as a "Special Discovery Player."¹³⁷ This allows a team to amortize the cost of its transfer fee over the length of the player's contract. Otherwise, the player's transfer fee would have to be accounted for in the year of acquisition, which could push the total cost beyond the maximum Salary Budget Charge for the player.¹³⁸

Even if a non-MLS player is on a team's Discovery List and the player is willing to enter into a contract with MLS on terms acceptable to the league and the team, the player may only be transferred from a club in another league to MLS during one of the two transfer windows.¹³⁹ In 2017, the Primary Transfer Window took place from February 14 until May 8, and the Secondary Transfer Window took place from July 10 until August 9.¹⁴⁰ Unlike trade deadlines in other American sports leagues, though, the transfer windows may not align with the seasons of the transfer target's team, making a deal harder to reach. Thus, even if MLS decides that it wants to acquire a player from a club in England's Premier League in mid-February, for example, which meets the inbound deadline for the Primary Transfer Window, the player's club may resist because it would be in-season. Moreover, even if the club had been willing to transfer the player in-season, the MLS window may come too late. In the English Premier League, for example, the 2017 winter Transfer Window was from January 1 to January 31.¹⁴¹

C. Player Acquisitions—Internal

1. Trades

Intra-league trades of players are permitted in MLS at any time during the offseason and during the Primary and Secondary Transfer Windows in-season.¹⁴² Since players are contracted to MLS rather to an individual team, "no trade" clauses, which are common in some other American sports leagues, generally do not exist in MLS, except for Designated Players. Such a free trade environment, which permits trades of players not only for other players, but also for Super-

137. 2017 MLS Roster Rules and Regulations, *supra* note 2 ("Player Categories on the Roster – Designated Player – Special Discovery Player").

138. *Id.*

139. *Id.* ("Player Acquisition Mechanisms – Primary Transfer Window and Secondary Transfer Window").

140. *Id.*

141. January Transfer Window, PREMIER LEAGUE, <https://www.premierleague.com/transfers/january> [<https://perma.cc/D9KQ-377G>].

142. 2017 MLS Roster Rules and Regulations, *supra* note 2 ("Player Acquisition Mechanisms – Trades").

Draft picks, Allocation Money, Targeted Allocation Money, Allocation Rankings, and International Player Spots,¹⁴³ is a foreign concept for players from other countries where transfers are common but only with the consent of the transferred player.¹⁴⁴ When Alain Roachat was traded from the Vancouver Whitecaps to D.C. United in 2013, he called the system “terrible” and inhuman.¹⁴⁵

2. *Free Agency*

In the Collective Bargaining Agreement the parties adopted in 2015, MLS granted for the first time a limited form of free agency to the players.¹⁴⁶ It was far short of what the players sought, but it was more than what they had, which was a system where a team held their MLS rights even after their contract expired.¹⁴⁷ Under this new hybrid form of free agency, out-of-contract players who are at least twenty-eight years of age and have been in the league for at least eight years are eligible to choose their next MLS team.¹⁴⁸ This does not mean that those players can simply let the market set their price, though, at least if the market is defined exclusively as other MLS teams.¹⁴⁹ Under the terms of the CBA, the maximum amount an MLS team can offer is limited to a set percentage depending upon the amount of their prior contract.¹⁵⁰ For players who made \$100,000 or less the prior year, the maximum raise they can be offered is twenty-five percent.¹⁵¹ For players who made between \$100,000 and \$200,000 the prior year, they can negotiate a raise of up to twenty percent.¹⁵² Finally, for players who made \$200,000 or more the previous year, the maximum raise they can receive is fifteen percent.¹⁵³ Notwithstanding the precision of such caps, the agreement apparent-

143. *Id.*

144. Jason Davis, *Does Trading Players Hurt Major League Soccer?* US SOCCER PLAYERS (June 12, 2013), <http://ussoccerplayers.com/2013/06/does-trading-players-hurt-major-league-soccer.html> [https://perma.cc/E92K-J9AN].

145. Thomas Floyd, *D.C. United's Roachat Rips Trade Experience as "Terrible," Not "Human,"* SBI SOCCER (June 10, 2013, 2:50 PM), <http://sbisoccer.com/2013/06/uniteds-experience-terrible> [https://perma.cc/WM9T-C84J].

146. MLS Collective Bargaining Agreement, *supra* note 44, § 29.5, at 79.

147. Richard Sandomir, *M.L.S. and Union Reach Deal Giving Free Agency to Veterans*, N.Y. TIMES (Mar. 4, 2015), http://www.nytimes.com/2015/03/05/sports/soccer/mls-and-union-reach-deal-giving-free-agency-to-veterans.html?_r=0 [https://perma.cc/9VJ2-JLFZ].

148. MLS Collective Bargaining Agreement, *supra* note 44, § 29.6(a)(i), at 79.

149. *Id.* § 29.6(b)(iii), at 80.

150. Press Release, Major League Soccer Players Union, MLS Players Union Announces Ratification of New Agreement with Major League Soccer (July 16, 2015), <https://www.mlssplayers.org/images/Ratification%20-%20July%2016%202015.pdf>.

151. MLS Collective Bargaining Agreement, *supra* note 44, § 29.6(b)(iii), at 81.

152. *Id.*

153. *Id.*

ly also provides for an increase in the percentage raises “for players who significantly outperform their contracts.”¹⁵⁴

The free agency process is too new to be able to make any judgments about how it is being utilized. Only a relatively small number of players qualified under the age and time of service requirements, which limits its value to the players. Nevertheless, a few players have signed with other MLS teams, and those players did get to freely “select” among interested teams,¹⁵⁵ which is one of the features of a free agency process. Only one player who moved teams received even the modest capped raise to his compensation that was contemplated under the CBA.¹⁵⁶ For some of the veteran players generally perceived to be on the downside of their careers who moved, it would not be surprising to find out that they took a pay cut rather than a pay raise of any amount. In that sense, this was a far cry from the free agency of other American sports.

3. *Re-Entry Draft*

The Re-Entry Draft is effectively the old version of free agency that was put in place under the prior Collective Bargaining Agreement.¹⁵⁷ Although much less attractive than the current free agency process, it is still in place for certain younger players who have not attained the age or years of MLS service to be eligible for free agency.¹⁵⁸ Players have to be either: (1) at least twenty-three years of age and have a minimum of three years of experience in MLS to be eligible if their current MLS team does not want to exercise their contract options, or (2) at least twenty-five years of age and have a minimum of four years of experience in MLS if their current MLS team does not want to resign them at an amount at least equal to their 2015 salary.¹⁵⁹ There are two stages to the Re-Entry Draft. In Stage One,

154. Press Release, Major League Soccer Players Union, *supra* note 150.

155. See, e.g., ESPN Staff, *Sporting KC Makes Justin Mapp First Free-Agent Signing in MLS History*, ESPN FC (Dec. 14, 2015), <http://www.espnfc.us/major-league-soccer/story/2756300/sporting-kc-make-justin-mapp-first-free-agent-signing-in-mls> [<https://perma.cc/NKT4-UUTN>].

156. Jeff Carlisle, *MLS' Free Agency Process Has Proved Beneficial for the Players Involved*, ESPN FC (Feb. 19, 2016), <http://www.espnfc.com/major-league-soccer/19/blog/post/2810678/mls-free-agency-meets-mixed-response-from-players-and-teams> [<https://perma.cc/YKX7-PA8Q>] (referencing Justin Mapp, who moved from Montreal to Sporting KC, as an example).

157. *MLS Players Union Announces That It Has Ratified Collective Bargaining Agreement*, MLS SOCCER (July 16, 2015, 5:17 PM), <http://www.mlssoccer.com/post/2015/07/16/mls-players-union-announces-it-has-ratified-collective-bargaining-agreement> [<https://perma.cc/SJ4S-Q6GC>].

158. *2017 MLS Roster Rules and Regulations*, *supra* note 2 (“Player Acquisition Mechanisms – Re-Entry Process”).

159. *Id.*; MLS Collective Bargaining Agreement, *supra* note 44, §§ 29.1, 29.3, at 77-78.

teams selecting a player agree to exercise their options or sign them to an amount equal to their last annual base salary.¹⁶⁰ If a player is not selected in Stage One, he may be selected in Stage Two, which is when the selecting team may negotiate a new salary with the player.¹⁶¹ Because of the increased flexibility to negotiate more favorable financial terms in Stage Two, few players are ever selected in Stage One. In the 2015 Re-Entry Draft, only two players were selected in Stage One, and in 2016, only three players were selected in Stage One.¹⁶²

4. *Waiver, Expansion, and Dispersal Drafts*

There are a variety of drafts occasionally held to reallocate players within MLS. These only occur when circumstances warrant. The most frequent of these is the Waiver Draft.¹⁶³ Much like in other American sports leagues, if a player is placed on waivers during the regular season, he is made available to all other teams on the same contractual terms to which he was signed for his existing team.¹⁶⁴ The teams select in reverse order of their points per game after the first three games of the season, with any team selecting a player moving to the bottom of the list.¹⁶⁵ If a player becomes available in the Waiver Draft before all teams have completed at least three games, then they select in reverse order of last season's finish.¹⁶⁶ One unique aspect of the Waiver Draft in MLS is that it applies not only to players waived by a current MLS team who are not eligible for the Re-Entry Draft or Free Agency, but also to former college players not selected in the SuperDraft or who did not make the team that selected him, as well as to players returning to MLS when the team, having the right of first refusal, chose not to exercise it.¹⁶⁷ Effectively, the Waiver Draft is utilized as a mechanism to avoid open bidding in these circumstances. As a practical matter, though, players made available in the Waiver Draft are often not in great demand by other

160. *Id.* §§ 29.1(b), 29.3(d), at 78.

161. *Id.* § 29.4(e), at 79.

162. *FC Dallas Select Maximiliano Urruti with No. 1 Pick in Re-Entry Draft*, MLS SOCCER (Dec. 11, 2015, 3:19 PM), <http://www.mlssoccer.com/post/2015/12/11/fc-dallas-select-maximiliano-urruti-no-1-pick-re-entry-draft> [https://perma.cc/VL8R-TBLS]; Sam Stejskal, *Three Players Selected in Stage 1 of the MLS Re-Entry Draft*, MLS SOCCER (Dec. 16, 2016, 3:18 PM), <https://www.mlssoccer.com/post/2016/12/16/three-players-selected-stage-1-mls-re-entry-draft> [https://perma.cc/7RL2-4J3L].

163. *2017 MLS Roster Rules and Regulations*, *supra* note 2, ("Player Acquisition Mechanisms – Waivers").

164. *MLS Collective Bargaining Agreement*, *supra* note 44, § 14.1(i), at 45.

165. *2017 MLS Roster Rules and Regulations*, *supra* note 2 ("Player Acquisition Mechanisms – Waivers – Waiver Order").

166. *Id.*

167. *Id.*

teams. In the most recent Waiver Draft held in December 2015, only one of the thirty players made available was drafted.¹⁶⁸

The next most common of the occasional drafts is the Expansion Draft, but it may be short-lived. In the round of expansion in 2014, Orlando City SC and New York City FC both began operations in MLS with an Expansion Draft.¹⁶⁹ Under the rules in effect for those drafts, teams were entitled to protect eleven players.¹⁷⁰ Generation Adidas and Homegrown players were automatically protected against selection, but Designated Players only had to be protected if they had a no-trade clause in their contracts.¹⁷¹ If a player was selected, his current team was entitled to move one more player to its protected list and no team could lose more than two players.¹⁷² Neither Orlando City SC nor NYC FC, however, truly built the core of its roster based on the Expansion Draft, leading to reports that the league was considering scrapping the Expansion Draft entirely when new expansion teams—Atlanta United FC, Minnesota United FC, and Los Angeles FC—entered the league in either 2017 or 2018.¹⁷³ The alternative was to give expansion teams more allocation money and international slots. Some suggested that this would hamper teams' ability to create a competitive roster beyond their three DPs,¹⁷⁴ but theoretically, it would allow them to choose whether they want to trade those assets to acquire MLS veterans or use them to participate in the global marketplace for talent. Nevertheless, at the end of the 2016 season, MLS elected to keep the Expansion Draft, albeit in modified form with Atlanta and Minnesota only selecting five players each, rather than the ten selected by Orlando and New York.¹⁷⁵

168. *Midfielder Michael Azira Selected by Colorado Rapids in MLS Waiver Draft*, MLS SOCCER (Dec. 9, 2015, 5:04 PM), <http://www.mlssoccer.com/post/2015/12/09/midfielder-micheal-azira-selected-colorado-rapids-mls-waiver-draft> [https://perma.cc/XN56-X8TY]; *MLS Announces List of Players Eligible for 2015 Waiver Draft*, MLS SOCCER (Dec. 8, 2015, 7:53 PM), <http://www.mlssoccer.com/post/2015/12/08/mls-announces-list-players-eligible-2015-waiver-draft> [https://perma.cc/9J4D-KX6L].

169. Jason Davis, *Plenty of Expansion Draft Surprises from NYC FC and Orlando City*, ESPN FC (Dec. 11, 2014), <http://www.espnfc.us/major-league-soccer/19/blog/post/2193006/major-league-soccer-plenty-of-mls-expansion-draft-surprises-from-nyc-fc-and-orlando-city-sc> [https://perma.cc/ZX2Q-GNBR].

170. *2014 Expansion Draft Rules*, MLS SOCCER, <http://pressbox.mlssoccer.com/content/2014-expansion-draft-rules> [https://perma.cc/7PGV-9BCZ].

171. *Id.*

172. *Id.*

173. Dyer, *supra* note 5.

174. Alicia Rodriguez, *Report: LAFC May Not Get to Use an MLS Expansion Draft to Stock Inaugural Roster*, ANGELS ON PARADE (Nov. 17, 2015, 12:13 PM), <http://www.thegoatparade.com/2015/11/17/9750866/report-lafc-may-not-get-to-use-an-mls-expansion-draft-to-stock> [https://perma.cc/8R4K-SPQU].

175. *2016 Expansion Draft Rules and Regulations*, MLS SOCCER, <http://pressbox.mlssoccer.com/content/2016-expansion-draft-rules-and-regulations> [https://perma.cc/SZT4-KLKM]; Sam Stejskal, *Expansion Draft Changes/ Burrito out at RSL/ Hedges' New*

The final internal mechanism for reallocating players within MLS is the Dispersal Draft. This is necessary if a team ends operation, which has occurred several times in the history of the league.¹⁷⁶ Although MLS would like to think such drafts are a thing of the past, it was used as recently as 2014 when Chivas USA ceased operations.¹⁷⁷ In some respects, the Dispersal Draft is unique within MLS in that the players are all contracted to MLS.¹⁷⁸ This means that it is effectively a mechanism by which MLS can decide whether it is worth retaining those players and / or exercising their player contracts for the following year without permitting open bidding. In that sense, it is really a variant on the Waiver Draft.

5. *Emergency Replacements*

Although MLS rosters are capped at thirty players, there are occasions where the rules permit a team to add to its roster because of unforeseen circumstances. The first is what is called an “Extreme Hardship Call-Up.”¹⁷⁹ This is permitted in one of two circumstances. The most common occurs if a team with three goalkeepers on its roster is down to only one healthy goalkeeper for a particular game.¹⁸⁰ In these circumstances, the league maintains a “pool goalkeeper” who can be assigned to a team on a short-term basis.¹⁸¹ Although all MLS players are contracted to the league rather than an individual team,

Deal, MLS SOCCER (Dec. 8, 2016), <http://www.mlssoccer.com/post/2016/12/08/stejskal-expansion-draft-changes-burrito-out-rsl-hedges-new-deal> [<https://perma.cc/DLU2-UKL8>].

176. See, e.g., Jeff Carlisle, *MLS Shuts Down Chivas USA; New Club, Ownership, to Return in 2017*, ESPN (Oct. 27, 2014), <http://www.espnfc.us/chivas-usa/story/2112968/mls-shuts-down-chivas-usa-new-club-ownership-to-return-in-2017> (Chivas USA); Steven Wine, *MLS Folds Fusion, Mutiny*, USA TODAY (Jan. 9, 2002, 12:56 AM), <http://usatoday30.usatoday.com/sports/soccer/mls/stories/2002-01-08-florida-fold.htm> (Tampa Mutiny and Miami Fusion).

177. Peltz, *supra* note 5.

178. See Gary Davidson, *MLS Eliminates Tampa Bay Mutiny, Miami Fusion, Leaving Anschutz, Hunt Running Seven of 10 Remaining Teams*, SOCCER TIMES (Jan. 8, 2002), <http://www.soccertimes.com/mls/2002/jan08.htm> (contracts owned by the league); *Major League Soccer to Hold Chivas USA Dispersal Draft on Nov. 19*, MLS SOCCER (Nov. 8, 2014, 7:35 AM), <http://www.mlssoccer.com/post/2014/11/08/major-league-soccer-hold-chivas-usa-dispersal-draft-nov-19> (describing the Dispersal Draft process).

179. *2017 MLS Roster Rules and Regulations*, *supra* note 2 (“Player Acquisition Mechanisms – Extreme Hardship Call-ups”).

180. *Id.*

181. Charles Gooch, *What Is a ‘Pool’ Goalkeeper and Why Does Sporting KC Suddenly Need One?*, KAN. CITY STAR (Aug. 13, 2014, 7:57 PM), <http://www.kansascity.com/sports/spt-columns-blogs/the-full-90/article1217414.html>. In the 2017 season, MLS maintained only one pool goalkeeper, suggesting that the advent of reserve squads playing in USL provided MLS teams with sufficient coverage for emergency signings and may eliminate the pool goalkeeper concept in the future. Jeff Carlisle, *Billy Heavner’s Life in Limbo in Major League Soccer as a “Pool Goalkeeper,”* ESPNFC (May 24, 2017), <http://www.espnfc.us/major-league-soccer/19/blog/post/3132935/billy-heavner-life-in-limbo-in-major-league-soccer-as-a-pool-goalkeeper>.

pool goalkeepers are players who are contracted to the league without actually being assigned to any individual team.¹⁸² They train with teams in their area, waiting for a call-up.¹⁸³ The second circumstance in which an Extreme Hardship Call-Up is permitted is when a team has fewer than four available outfield substitutes, or, in other words, when it has fewer than fourteen outfield players available.¹⁸⁴ This seems particularly unlikely, especially with rosters as large as thirty and most teams having an affiliate with a USL team where a short-term loan can be arranged for up to four days for outside competitions, although utilizing a USL short-term loan for MLS players means that the team must follow the Extreme Hardship Call-Up process.¹⁸⁵

A second unforeseen circumstance in which a roster move is permitted is in the event of injuries. Although injuries are also likely to be the most common reason for an Extreme Hardship Call-Up, the rules do not actually require that the need for that kind of signing arise because of an injury. Those unforeseen circumstances could include absences for personal circumstances, such as the birth of a child or the death of a family member. Losing the services of a player because of an injury is covered by two separate provisions depending upon the severity of the injury. For a player lost to an injury for the remainder of the season, the team can sign a player as a “Season-Ending Injury Replacement.”¹⁸⁶ For a player lost to an injury for a shorter period (they must sit out a minimum of six games), a team can sign what is called a “Short-Term Injury Replacement.”¹⁸⁷ In either case, the injured player cannot be placed in the designated category until a replacement is signed, and the team remains responsible for the Salary Budget Charge of the injured player as well as for the replacement.¹⁸⁸ Similarly, the team remains subject to the limits on International Player Slots, although an International Player may replace an injured International Player.¹⁸⁹

D. Non-MLS Rules

Adding another layer to the complexity, MLS is not the only source of rules governing the operation of the teams in its league. Since MLS

182. Gooch, *supra* note 177.

183. *Id.*

184. *2017 MLS Roster Rules and Regulations*, *supra* note 2, (“Player Acquisition Mechanisms – Extreme Hardship Call-ups”).

185. *Id.* (“Player Acquisition Mechanisms – Extreme Hardship Call-ups – USL Player Short Term Agreements in cases of Extreme Hardship”).

186. *Id.* (“Player Acquisition Mechanisms – Season-Ending Injury”).

187. *Id.* (“Player Acquisition Mechanisms – Short-Term Injury Replacements”).

188. *Id.* (“Player Acquisition Mechanisms – Season-Ending Injury – Budget Charge for Season-ending Injuries”).

189. *Id.* (“Player Acquisition Mechanisms – Season-Ending Injury”).

is a sanctioned league under the U.S. Soccer Federation (“USSF”) and the Canadian Soccer Association (“CSA”), and both the USSF and the CSA are authorized by FIFA to serve as the sanctioning bodies for leagues operating in their respective jurisdictions, MLS is indirectly required to comply with FIFA rules.¹⁹⁰ This includes the rules governing the game itself—called the “Laws of the Game”—which are the province of an organization based in Switzerland called the International Football Association Board (“IFAB”).¹⁹¹ Comprised of FIFA, the English Football Association, the Scottish Football Association, the Football Association of Wales, and the Irish Football Association (Northern Ireland), the IFAB is the keeper of the rules, so-to-speak.¹⁹² It was created in 1886 in England to regulate the growing sport and to standardize the rules for its play.¹⁹³ FIFA was added to the IFAB, without removing any of the legacy British football associations, in the early twentieth century as the sport spread globally.¹⁹⁴ The current version of the Laws and its Interpretations, which operate like regulations that amplify the rules, is 139 pages, and a major reform project was undertaken recently to amend and simplify those rules.¹⁹⁵

In recent years, MLS has complied with these Laws of the Game, but that was not always the case. In the early years of operation, MLS had kick-ins rather than throw-ins, corner kicks from the edge of the box rather than the corner of the field, and ties were broken with shootouts involving a player starting at the thirty-five-yard line and having five seconds to score past the goalkeeper.¹⁹⁶ How did MLS get away with such clear deviations from the Laws set forth by the IFAB? As Francisco Marcos, the founder and first president of current third division league USL explained when asked about his

190. FIFA Statutes, art. 10(4)(a) (Apr. 2015), http://www.fifa.com/mm/Document/AFederation/Generic/02/58/14/48/2015FIFAStatutesEN_Neutral.pdf [https://perma.cc/5M2A-4XG9].

191. *Id.* at arts. 6, 10(4)(b), 13(1)(a)(d).

192. *History of the Laws of the Game—From 1863 to the Present Day*, FIFA, <http://www.fifa.com/about-fifa/who-we-are/the-laws/> [https://perma.cc/AF69-2JM7].

193. *Id.*

194. *Id.*

195. Rob Harris, *Soccer Laws Overhauled in an Attempt to Remove Inconsistencies*, AP (Jan. 8, 2016, 11:57 PM), <http://bigstory.ap.org/article/43adb78c46c14149b955ff9408ff2ca6/soccer-laws-overhauled-attempt-remove-inconsistencies> [https://perma.cc/ZW6E-RLXY]; *Laws of the Game*, FIFA (2015-2016), http://resources.fifa.com/mm/document/footballdevelopment/refereeing/02/36/01/11/lawsofthegameweb_en_neutral.pdf [https://perma.cc/9ZUG-2GVU]; *Amendments to the Laws of the Game—2015/2016 and Information on the Completed Reform of the International Football Association Board*, IFAB (May 2015), http://resources.fifa.com/mm/document/affederation/ifab/02/60/91/38/circular_log_amendments_2015_v1.0_en_neutral.pdf [https://perma.cc/JSC2-7584].

196. Nate Sulat, *Building the Soccer Pyramid: The Quirky Rules Sometimes Used in the American Game*, MLS SOCCER (June 6, 2014, 10:10 AM), <http://www.mlssoccer.com/post/2014/06/06/building-soccer-pyramid-quirky-rules-sometimes-used-american-game> [https://perma.cc/S8T8-2WJK].

league's own deviation from the Laws of the Game to permit five substitutions, rather than three, due to the demands of playing two games in a weekend with a small roster, "FIFA looked the other way. FIFA will look the other way whenever it is convenient to look the other way."¹⁹⁷ In other words, MLS is subject to FIFA rules in designing the game, but enforcement is a matter of FIFA's discretion, creating additional uncertainty to an already complex system.

Off the field, MLS is also subject to FIFA regulations on the transfer of players.¹⁹⁸ For example, the CBA agreement with the Players Union provides that except as specifically provided otherwise, "MLS shall comply with FIFA regulations regarding the player's international registration and playing rights."¹⁹⁹ MLS also agrees that "any loan, transfer, assignment or sale of MLS's rights to the Player's services, whether prior to or after the termination of the Player's [Standard Player Agreement], shall only be made in accordance with all applicable rules and regulations of FIFA and any relevant governing body" so long as the rules don't conflict with state or federal law or any other provisions of the CBA.²⁰⁰ In part, this requires that the league obtain an International Transfer Certificate from the Football Association where the player formerly played and provide one when a player's contract terminates and he desires to play elsewhere.²⁰¹

III. COMPLEXITY THEORY

The web of rules that govern the acquisition of players in MLS certainly seems complex to the average observer, but many rules seem complex to the uninitiated even though they are considered fairly simple by seasoned practitioners. Moreover, despite the general bias in favor of simplicity, complexity is sometimes accepted as a "necessary evil."²⁰² We therefore need to have a more robust understanding of the theory of complexity and its uses and abuses before classifying MLS' system of roster rules as complex, and before condemning it for being so.

197. *Id.*

198. See *Regulations on the Status and Transfer of Players*, FIFA, http://www.fifa.com/mm/document/affederation/administration/regulations_on_the_status_and_transfer_of_players_en_33410.pdf [<https://perma.cc/3ATW-EGK8>].

199. MLS Collective Bargaining Agreement, *supra* note 44, §18.9, at 55.

200. *Id.* § 15.4, at 47.

201. *Regulations on the Status and Transfer of Players*, *supra* note 198, at pt. III, art. 9.

202. See, e.g., Michael Walpole, *Tax Complexity: A Necessary Evil?*, in *TAX SIMPLIFICATION* 181, 192 (Chris Evans et al. eds., 2015).

A. Defining Complexity

Some people use the word “complex” to describe a particular rule or provision when they really just mean that it is complicated.²⁰³ In this sense, complexity can merely be a function of linguistic indeterminacy. At its most basic level, it is difficult to describe a requirement in a way that is both precise and simple. This can be because of the incompetence or sloth of the drafter, or it can be because of the failings of the English language. Just as an interpreter sometimes has difficulty translating a concept because of the lack of a word in English that is comparable to the word used in the passage submitted for translation,²⁰⁴ so too do drafters struggle in vain for words that could explain in simple terms the more complicated and nuanced intent behind a particular provision.

Complexity can also be defined in more objective terms. For example, a document or set of rules is often characterized as complex merely because of its length or the number of provisions or sections it contains.²⁰⁵ This is often seen as per se evidence of the Internal Revenue Code’s complexity, with critics pointing to its length and virtually nothing else to justify their characterization.²⁰⁶ In the contractual realm, complexity is sometimes measured by counting the number of particularly complicated provisions, such as “elaborate clauses,” which address things like control, incentives, and price; “enforcement provisions,” which include confidentiality, arbitration, and choice of law provisions; and “coordination provisions,” which include notification and auditing rights.²⁰⁷ More generally, “[c]omplex contracts include details like roles and responsibilities to be performed or specific procedures for monitoring, consequences of non-compliance, and description of expected outcomes or output.”²⁰⁸

203. See, e.g., RICHARD A. EPSTEIN, *SIMPLE RULES FOR A COMPLEX WORLD* 24 (1995).

204. RITA COPELAND, *RHETORIC, HERMENEUTICS, AND TRANSLATION IN THE MIDDLE AGES* 47-48 (1991).

205. Paul L. Joskow, *Asset Specificity and the Structure of Vertical Relationships: Empirical Evidence*, 4 J.L. ECON. & ORG. 95 (1988); David T. Robinson & Toby E. Stuart, *Financial Contracting in Biotech Strategic Alliances*, 50 J.L. & ECON. 559, 586 (2007).

206. Jason Russell, *Look at How Many Pages Are in the Federal Tax Code*, WASH. EXAMINER (Apr. 15, 2016, 12:01 AM), <http://www.washingtonexaminer.com/look-at-how-many-pages-are-in-the-federal-tax-code/article/2563032> [<https://perma.cc/28R4-QWPX>] (“As they rush to file their taxes by April 18, Americans are rightfully frustrated with the complexity of the 74,608-page-long federal tax code.”).

207. Jérôme Barthélemy & Bertrand V. Quélin, *Complexity of Outsourcing Contracts and Ex Post Transaction Costs: An Empirical Investigation*, 43 J. MGMT. STUD. 1775 (2006); Hansen & Higgins, *supra* note 20, at 6; Reuer & Ariño, *supra* note 19, at 319.

208. Jochen Schweitzer, *Contracting and Innovation Culture in Alliances* 10 (U. of Tech., Sydney, paper presented at the 5th Asia-Pacific Innovation Conference, 2014), https://www.researchgate.net/profile/Jochen_Schweitzer/publication/281121011_Contracting_and_innovation_culture_in_alliances/links/55d7961008aecd56b9aa18cf.pdf [<https://perma.cc/E69S-BJMA>].

Peter Schuck offers a broader definition of complexity than mere complicatedness or lengthiness. He defined a system as complex when it is dense, technical, institutionally differentiated, and indeterminate or uncertain.²⁰⁹ Under this definition, rules or contractual provisions are dense when they are “numerous and encompassing.”²¹⁰ They seek to “occupy a large portion of the relevant policy space and seek to control a broad range of conduct.”²¹¹ A dense system of rules would be considered technical when the rules “require special sophistication or expertise on the part of those who wish to understand and apply them,” which generally means employing “specialized terminology.”²¹² Pension law and tax law are often cited as examples of dense, technical systems of rules that are made even more complicated by the fact that they attempt to “regulate a myriad of issues” between individuals, employers or payers, and the government as regulator.²¹³

A system is institutionally differentiated when “it is governed by statutory provisions, regulatory standards promulgated by several different agencies,” and by common law principles applied in litigation.²¹⁴ This is what some have referred to as “functional” or “operational” complexity.²¹⁵ For example, a rule adopted by a federal administrative agency may be written quite clearly, but it may conflict with other rules. Even if the agency rules provide guidance on resolving the conflict, the rule may be subordinate to other provisions such as the Constitution, the statutory provision delegating power to the agency to adopt the rule, and the agency’s own pronouncements and guidance regarding the application of the rule. Moreover, while the agency may interpret the rule in choosing to apply it to a particular situation, that interpretation may be overruled by the courts or courts in different jurisdictions may accord the interpretation of the agency differing levels of deference.²¹⁶

Finally, a system of rules may be complex not so much because it is detailed and full of exceptions, but rather the opposite. It may be complex because it is underspecified, such as when the rules, and the system itself, are “open-textured, flexible, multi-factored, and fluid.”²¹⁷ For example, a common law system of rules, governed by prec-

209. Schuck, *supra* note 16, at 3.

210. *Id.*

211. *Id.*

212. *Id.* at 4.

213. Kades, *supra* note 16, at 408; Miller, *supra* note 16, at 6; Schuck, *supra* note 16, at 3-4.

214. Schuck, *supra* note 16, at 4.

215. Wright, *supra* note 16, at 726.

216. See Lisa Schultz Bressman, *How Mead Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1475 (2005) (describing how difficult it is to determine whether agency action should be accorded judicial deference).

217. Schuck, *supra* note 16, at 4 (footnote omitted).

edent as well as by individual judges, may provide some guidance to participants, but nothing approaching certainty even in the face of precedent because of both the ability to distinguish precedent and the ability to overturn it. This helps to explain why a tax lawyer's legal opinion, which is often sought out to guard against the imposition of penalties against taking unreasonable reporting positions, is often carefully couched in probabilistic terms even if the lawyer authoring the opinion has extensive training in the law and is fully informed as to all relevant precedents.²¹⁸ Alternatively, this lack of specification may be deliberate and enshrined in the statutes themselves. Examples include a reasonableness requirement in tort law or a general anti-abuse provision in tax law.²¹⁹

These are not the only characteristics one might use to describe a complex system,²²⁰ but they are the types of characteristics one normally associates with a complex system. Moreover, not all the characteristics need be present at all or to the same degree in order to establish complexity. Rather, most rules or systems of rules fall onto a continuum that measures the degree of complexity that may be present.²²¹ The greater the number of characteristics present, and the greater their strength, the more it shifts toward complexity and away from simplicity.²²²

B. *Rationales for Complexity*

Only the most dedicated wordsmith would profess any love for a complex rule or system of rules. Most seek simplification. What, then, is the justification for complexity? The answer differs depending upon whether it is found in legal and administrative rules or whether it is found in contractual provisions or organizational processes.²²³

In the context of legal rules, complexity is considered problematic because it raises the costs both for those tasked with complying with

218. Jasper L. Cummings, *The Range of Legal Tax Opinions, with Emphasis on the 'Should' Opinion*, 98 TAX NOTES 1125 (2003); Robert P. Rothman, *Tax Opinion Practice*, 64 TAX LAW. 301 (2011).

219. Pamela Olson, *Some Thoughts on Anti-Abuse Rules*, 48 TAX LAW. 817 (1995); Schuck, *supra* note 16, at 4.

220. For example, Edward McCaffery has suggested that there are three different types of complexity: "technical complexity," which refers to the difficulty of the intellectual exercise of understanding the rules; "structural complexity," which refers to the difficulty of applying the rules to a specific transaction or circumstances; and "compliance complexity," which involves the difficulty an individual or entity has in keeping records and filing the forms necessary to meet the requirements. Edward J. McCaffery, *The Holy Grail of Tax Simplification*, 1990 WIS. L. REV. 1267, 1270-72 (1990).

221. Schuck, *supra* note 16, at 5.

222. *Id.*

223. *Id.* at 12.

the rules as well as those in charge of enforcing them.²²⁴ For those subject to the rules, a lack of clarity can impose a variety of costs. First, there are costs incurred to understand and comply with the rule.²²⁵ If the rule is difficult to understand or the various overlapping systems of rules are difficult to navigate, then the person seeking to comply may have to hire a specialist to advise them as to whether their proposed course of action is permitted. Those who choose not to do so or who cannot afford to do so may unwittingly fail to comply, incurring both the costs associated with wasted activity and with the unwinding of completed transactions.

Second, where the complexity of a rule is a function of its indeterminacy, compliance may require foregoing productive activity, which imposes costs in the form of lost profits or the loss of whatever value was anticipated from the activity. This can occur because the uncertainty of the rule, which may be designed to allow it to be more flexibly applied, necessitating that a wide berth be given to activities that could plausibly appear to be governed by the rule. If a business refrains from engaging in otherwise permissible activity, it not only imposes costs on the business itself from the loss of revenue, but to society as a whole from the chilling of productive activity.

Finally, there may be costs associated with potential litigation related to compliance with the rule. Obviously, if a complex rule is not observed to the letter of the law and litigation or an enforcement action ensues, the resulting costs can be great both in terms of attorney's fees and in terms of lost productivity. In a multi-layered complex system, the costs may be multiplied as the parties have to weave their way through various levels and different jurisdictions. Even in the absence of actual litigation, however, a business may have to tie up large amounts of capital in the form of reserves against the potential threat of litigation when questionable activity is undertaken.

Complexity may be no less costly for those who are charged with enforcing the rules. If the rules are indeterminate and therefore flexible, they may be more plausibly deployed in a wide variety of circumstances, but it may be more difficult to persuade courts that they should be permitted in a specific circumstance. If, by contrast, the rules are drafted in a detailed and precise fashion, it may be easy to apply them to the circumstances specifically contemplated by the rules, but it also may be easier for businesses to avoid them by exploiting the gaps that lie between the rules. Furthermore, if the complexity is a function of the multiple, overlapping and interlocking systems, the enforcement costs may be duplicated as a result of un-

224. Kaplow, *supra* note 16, at 151.

225. *Id.*

certain jurisdictional boundaries and inconsistent positions taken by decision-makers at the various stages of review.

Given these costs, why is legal complexity tolerated in many instances? A common rationale offered in defense of complexity is that it ensures a fairer application of the rules.²²⁶ A bright-line rule is simpler to apply than a rule that is riddled with exceptions, but those exceptions may reflect the fact that there are real differences that demand different treatment as a matter of equity. Therefore, in order to ensure similarly situated people are treated the same (sometimes called "horizontal equity"), an exception must be created to avoid subjecting one group, but not another, to a rule.²²⁷

Under this fairness rationale, complexity may be necessary not merely because it ensures that only the proper parties are subject to the rules, but rather because it provides adequate information to the regulated parties. Vague rules may give insufficient notice to the intended targets that they are subject to the rules and insufficient information as to how to comply with them. Moreover, a system of rules may be complex in the sense of having multiple layers of appeals in order to ensure that the rules are fairly applied and that the offending party has indeed violated the rules. A simpler system might avoid that complexity, but at the price of potentially subjecting innocent parties to liability.

Another justification for legal complexity is that it produces a more efficient result in the sense that more precise rules help to differentiate socially productive activity from socially unproductive activity.²²⁸ This better allocates resources to their highest and most productive use, at least to the extent that the benefits of those uses outweigh the costs associated with interpreting and complying with

226. See, e.g., Miller, *supra* note 16, at 6 ("Complexity is sometimes justified on the grounds that simplification will reduce fairness."); Deborah L. Paul, *The Sources of Tax Complexity: How Much Simplicity Can Fundamental Tax Reform Achieve?* 76 N.C. L. REV. 151, 155 (1997) ("Complexity is a by-product of a tax regime's reconciliation of the lofty aspiration to distribute tax burdens equitably and the mundane requirement that the tax be susceptible to administration and compliance."). For further discussion of the interplay of complexity and equity, see McCaffery, *supra* note 220, at 1279-91.

227. Although complexity is usually attributed to a desire to create a set of rules that treats different individuals and groups fairly, it is also possible to explain complexity as a means to favor one individual or group. For example, an exception written into a statute at the behest of a wealthy campaign donor may increase the complexity of the statutory scheme at the price of, rather than in advance of, fairness. The so-called "rifle-shot" provision is an example of a specially targeted provision to benefit one individual or entity that makes the law more complex, while arguably reducing its fairness. See, e.g., Lawrence Zelenak, *Are Rifle Shot Transition Rules and Other Ad Hoc Tax Legislation Constitutional?*, 44 TAX L. REV. 563 (1989) (discussing the unequal treatment, while concluding that an equal protection challenge would likely fail).

228. Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257, 262 (1974); Kaplow, *supra* note 16, at 161.

the rules.²²⁹ Even an under-specification of the rules may be efficient, to the extent that it also provides a degree of discretion or flexibility in applying the rules in a way that maximizes the achievement of a system's goals.²³⁰ In both cases, however, when the costs associated with understanding, complying with, and enforcing those rules grow too high, the net benefits could weigh in favor of simplicity.²³¹

C. Contractual Complexity

Although rules imposed as part of a contractual relationship are superficially similar to the rules imposed by government regulators, they must be evaluated under different standards. Many of the objections to rules imposed by statutes and administrative regulations simply do not apply in a cooperative venture where the parties have consensually agreed to be bound by the rules via contract.

One reason to draft complex rules in a cooperative venture is to ensure partners or participants remain aligned in the pursuit of a common goal.²³² As UCLA Professor William Ouchi explained, "the fundamental problem of cooperation stems from the fact that individuals have only partially overlapping goals. Left to their own devices, they pursue incongruent objectives and their efforts are uncoordinated. Any collectivity which has an economic goal must then find a means to control diverse individuals efficiently."²³³ Complex contractual rules are a way to reinforce "goal congruence" where it does not otherwise naturally exist.²³⁴

A subset of the issue of goal alignment is the problem of partner opportunism or hold-up. Harvard Economist Oliver Williamson has described opportunism as "a variety of self-interest seeking . . . [that] extends simple self-interest seeking to include self-interest seeking with guile."²³⁵ The risk of opportunistic behavior often arises where

229. Kades, *supra* note 16, at 419.

230. See John A. Miller, *Indeterminacy, Complexity, and Fairness: Justifying Rule Simplification in the Law of Taxation*, 68 WASH. L. REV. 1, 4 (1993).

231. Kaplow, *supra* note 16, at 151.

232. See, e.g., Simon Rottenberg, *The Baseball Players' Labor Market*, 64 J. POL. ECON. 242, 242 (1956) ("Complexity also arises from the effort to compromise inconsistent interests within baseball").

233. William G. Ouchi, *Markets, Bureaucracies, and Clans*, 25 ADMIN. SCI. Q. 129, 130 (1980).

234. *Id.* at 136; Schweitzer and Gudergan, *supra* note 19, at 32 ("Goal incongruence affects contractual complexity because alliance partners are likely to first achieve consistency and mutual understanding of objectives and then enter negotiations of detailed or suitably stringent contracts in order to safeguard their interests. Put simply, when goal incongruence is low, contractual complexity is low, while in the case of significant goal incongruence potential partners would either decide to not enter the alliance or agree on complex contracts.").

235. Williamson, *supra* note 18, at 234 n.3.

contracts are incomplete in the sense that they cannot provide for all contingencies or account for unforeseeable changes in circumstances.²³⁶ When these events occur and the parties seek to adapt, partners acting opportunistically can try to hold-up the contract by refusing to cooperate until their new demands are met.²³⁷ They effectively try to renege on their obligations and negotiate for higher benefits.²³⁸

This partner opportunism can occur for a variety of reasons. One of the most cited explanations is the presence of transaction-specific investment.²³⁹ If the investment is liquid and easily re-deployed, then uncooperative partners can simply take their marbles and go home without much resistance by the remaining partners if they are unhappy with the direction of the venture. If the venture has invested in specific assets, however, that would lose a percentage of their value when taken out of the venture; a partner can hold-up the other partners by threatening to withdraw and force the break-up of those firm specific assets.²⁴⁰

A second explanation for partner opportunism is the high costs associated with finding a replacement partner.²⁴¹ If partners are fungible, then a partner's threat to withdraw can be empty, reducing its ability to hold-up the other partners. If, however, the cost of searching for a new partner is high, then there is a premium placed on the importance of keeping the partner tied into the venture. This can exacerbate the risk of partners opportunistically taking advantage of this leverage to hold-up the venture.

As the risk of partner opportunism rises, so too does the need for complex "contractual safeguards."²⁴² These safeguards, however, are costly to negotiate, monitor, and enforce, making them inefficient when the partners are relatively aligned in their objectives.²⁴³ If those costs exceed the risks of opportunism and hold-up, then a relatively simple contract can be employed.

In long-term relationships, repeated contracting increases the risk of partnership hold-up because of the continual opportunity to renegotiate contractual safeguards. Long-term contracts, however, are difficult to draft because of the uncertainty about the future and the

236. PAUL MILGROM & JOHN ROBERTS, *ECONOMICS, ORGANIZATION & MANAGEMENT* 128 (1992); Francine Lafontaine & Margaret E. Slade, *Inter-Firm Contracts: Evidence, in THE HANDBOOK OF ORGANIZATIONAL ECONOMICS* 958, 965 (Robert Gibbons & John Roberts, eds., 2013).

237. Lafontaine & Slade, *supra* note 236, at 958.

238. *Id.*

239. Reuer & Ariño, *supra* note 19, at 316.

240. Joskow, *supra* note 19, at 169; MILGROM & ROBERTS, *supra* note 236, at 135.

241. Schweitzer & Gudergan, *supra* note 19, at 27.

242. Reuer & Ariño, *supra* note 19, at 315.

243. *Id.*

need for adaptation.²⁴⁴ Complexity only increases under those circumstances because the parties need to provide for a wider variety of contingencies than in short-term arrangements. In the context of a venture where evolving circumstances are likely, that often leads parties to seek a more permanent, yet flexible, means of safeguarding their investment.²⁴⁵

An equity governance structure such as a corporation, partnership, or limited liability company is one alternative to long-term contracting. This permits adaptation because decisions are made through the governance mechanism of the organization, rather than as a subject of individual contracts.²⁴⁶ One advantage is that it allows disputes to be worked out internally in private rather than with the “full contractual specification” necessary in a non-equity venture.²⁴⁷ It also avoids the hold-up problem that might plague repeated use of short-term contracts as a means of adapting to new circumstances.²⁴⁸

From an organizational control theory perspective, such an equity governance structure then becomes bureaucratic, involving complex rules, when goal incongruence is present, the risk of partnership opportunism is high, and it is important to remain flexible and adaptable in the face of changing circumstances. As Jochen Schweitzer has written:

A bureaucratic culture emerges when the parties to a partnership seek to eliminate the potential for opportunistic behavior by quantifying and monitoring joint activities and mutual performance. Hence, within bureaucracies, partners assume that the majority of contingencies can be dealt with by policies, standardized procedures, formal division of responsibility, and hierarchical structures which are typically established within the contractual agreement for the partnership.²⁴⁹

This kind of a formal structure may be particularly necessary during periods of growth where a long-term venture is bringing in new investors and the cultural preconditions for goal congruence are weak.

If, by contrast, the risk of opportunism is low and/or the transaction is unlikely to recur, then a formal governance structure with

244. Williamson, *Transaction-Cost Economics*, *supra* note 18, at 237.

245. MILGROM & ROBERTS, *supra* note 236, at 31.

246. Jochen Schweitzer, *The Link Between Contractual Complexity and Governance Forms in Alliances* (paper presented at the 2009 Annual Academy of Management meeting), https://www.researchgate.net/publication/281244374_The_Link_Between_Contractual_Complexity_And_Governance_Forms_In_Alliances.

247. Rachele C. Sampson, *The Cost of Misaligned Governance in R&D Alliances*, 20 J. L. ECON. & ORG. 484, 490 (2004); Williamson, *Transaction-Cost Economics*, *supra* note 18, at 246.

248. Williamson, *Transaction-Cost Economics*, *supra* note 19, at 246.

249. Schweitzer, *supra* note 208, at 10 (citation omitted).

complex rules and policies may be inefficient. It risks being too cumbersome, unnecessarily slowing down decisions.²⁵⁰ The tradeoff, therefore, is between controlling partners and ensuring flexibility, on the one hand, and excessive governance and inefficiency on the other hand.

IV. COMPLEXITY AS A DESIGN FEATURE IN MAJOR LEAGUE SOCCER

As Part II illustrated, MLS' Roster Rules are complex under virtually any definition of the word. They are numerous and seek to be all-encompassing. They are full of the unique terminology that often requires special expertise, such as "Allocation Money," "Designated Players," and "Re-Entry Drafts," which may explain why so many foreign coaches and front office personnel have such difficulty adjusting to them.²⁵¹ They are also subject to the overlay of FIFA rules and regulations, which only increases their complexity. Finally, and most significantly for many critics, they are non-transparent and constantly changing in a way that appears to outside observers to be designed to favor one team over another. The remaining question, however, is whether the complexity of the system is problematic.

A. *What Kind of Complexity?*

Whether Major League Soccer's Roster Rules and Regulations are unnecessarily complex may depend upon whether they are properly evaluated under the standards for legal complexity or contractual complexity. The benefits of complexity in each context are different. Whereas legal complexity is concerned with guarding against unfairness, contractual complexity is concerned with guarding against goal incongruence and partner opportunism. Moreover, the costs associated with legal and contractual complexity are different. Legal complexity potentially makes it costly for people governed by the rules to interpret and comply with them, while contractual complexity potentially makes it too costly for the parties to undertake a venture in the first place.

In one sense, the answer is that neither standard squarely applies to MLS. The Roster Rules and Regulations, despite looking like legal

250. Jeffrey J. Reuer & Africa Ariño, *Contractual Renegotiations in Strategic Alliances*, 28 J. MGMT. 47, 50 (2002).

251. Michael Lewis, *MLS and Foreign Coaches*, US SOCCER PLAYERS (Dec. 29, 2009), <http://ussoccerplayers.com/2009/12/by-michael-lewis---new-york-ny-dec-29-2009-ussoccerplayers---the-major-league-soccer-landscape-is-littered-with-for.html> [https://perma.cc/W56T-GZS4]. But see Wes Burdine, *Dispelling the Myth: Foreignness and MLS Coaching*, FIFTY FIVE ONE (Nov. 10, 2015), <http://fiftyfive.one/2015/11/dispelling-myth-foreignness-mls-coaching/> [https://perma.cc/MY7K-ZA8R]; Steve Davis, *Old Rules About Foreign Coaches May Not Apply to Our New MLS*, WORLD SOCCER TALK (Nov. 26, 2015), <http://worldsoccertalk.com/2015/11/26/foreign-coaches-in-major-league-soccer-mls/> [https://perma.cc/8YCR-3VD7].

rules, are not actually rules imposed by an external body upon the participants. The investor-operators each consent to be governed by them by virtue of their participation in the league. At the same time, they are not the product of contractual negotiation either. Major League Soccer's limited liability company agreement is a contract, but despite the fact that each investor-operator has a seat on the entity's Board of Governors, the rules themselves are not the same as contractual provisions that are individually negotiated *ex ante* as part of a bargaining process.

Although neither is an exact fit, the contractual model better describes the creation and existence of the roster rules and regulations used by MLS. Each of the investor-operators agrees to the governance structure when it executes the contract that constitutes the limited liability company agreement. That includes participating in the creation of the rules in their roles as members of the management committee and agreeing to the process by which the rules are created.

Indeed, even apart from the limited liability company agreement, the relationship between MLS and the investor-operators is entirely contractual. According to the information disclosed to the court in the *Fraser* case, MLS contracts with each of the investor-operators to operate one of the league's teams.²⁵² Under the contract, each investor-operator has the "exclusive right and obligation to provide Management Services for a Team within its Home Territory."²⁵³ These agreements provide that the investor-operators "may trade players with other MLS teams and select players in the league's draft. Such transactions, however, must follow strict rules established by the league. Most importantly, no team may exceed the maximum player budget established by the management committee."²⁵⁴ Thus, the investor-operators are also subject to the MLS Roster Rules and Regulations by virtue of their contractual agreement to submit to such rules as a condition to operating a team. In this sense, the MLS system is a hybrid contractual arrangement that in some respects relies upon an equity governance model and in some respects relies upon long-term contracting to allocate the responsibility for managing an individual team.

It is true that the MLS Roster Rules and Regulations operate like legal rules once they are adopted. Nevertheless, this is no different from contractual provisions and commitments, which are binding upon the parties once executed. Moreover, unlike legal and administrative rules, the parties subject to the MLS roster rules and regulations—each of its investor-operators—have a say in whether those

252. *Fraser v. Major League Soccer (Fraser II)*, 284 F.3d 47, 53 (1st Cir. 2002).

253. *Id.* at 54.

254. *Id.* at 54.

rules or adopted or amended. If an investor-operator is unhappy with a rule and cannot convince its partners to change the rule, it can exercise its ability to withdraw from the LLC altogether by moving to another league or by transferring its interest in the operating agreement to another party, subject to the transfer restrictions contained in the agreement.²⁵⁵

Because of the contractual nature of the MLS Roster Rules, applying the standards for evaluating legal complexity would be awkward at best. Many of the typical complaints about legal complexity, such as the costs associated with uncertainty, hiring experts to interpret the rules, and hiring lawyers to litigate them, are less relevant in a small group cooperative venture like MLS. For example, even if the rules are difficult to understand, the league's office can easily instruct investor-operators on them and it can provide authoritative interpretations in individual cases. Moreover, since it must approve all transactions centrally,²⁵⁶ the expense of enforcing the rules is already internalized into the investor-operators' cost-benefit analysis on their investments. Although a costly dispute could theoretically arise as a result of an interpretation that an investor-operator found questionable, the parties would be contractually bound to abide by the dispute resolution mechanism agreed to in the limited liability company agreement. This would not eliminate the possibility of costly litigation but would likely reduce it.

B. The Justification for Contractual Complexity in MLS

Applying the standards used for evaluating contractual complexity, it is apparent that the MLS roster rules and regulations are not complex by accident, but rather by design. There are two features of MLS that dictate a certain amount of complexity. First, the league was created and arguably still serves to address the potential risk of partner incongruence, which is a growing issue as the investor base further grows and diversifies. Complex provisions help to ensure discipline in light of this partner incongruence. Second, MLS is a long-term venture and it faces significant uncertainty because of the constantly changing circumstances for professional soccer in the United States and globally. An organizational structure that facilitates quick action and permits a range of options may permit MLS to better adapt to these changes and future opportunities.

255. *Id.* at 54.

256. *See 2017 MLS Roster Rules and Regulations*, *supra* note 2 (providing that trades must be approved by the MLS League Office).

1. Partner Congruence

One of the principal reasons Alan Rothenberg chose to use the single-entity limited liability company structure was to guard against partner incongruence on the question of player compensation, since that led to the destructive pattern of spiraling salaries in the old NASL.²⁵⁷ The complex rules relating to player salaries, including the Salary Budget and the limit exceptions for going beyond the budget, all reflect and reinforce this original commitment to keeping salaries at a manageable level so that individual teams cannot attempt to secure a competitive advantage for themselves at the expense of the long-term survival of the league.

This focus on maintaining partner congruence was evident from the outset of MLS. As the owner-operator of the San Jose Clash, which later moved to Houston to become the Dynamo, stated in an interview at the beginning of the inaugural season, “[w]e’re competing but not to the point of destroying each other.”²⁵⁸ Rothenberg designed it so that the structure would help to ensure that the individual investors remained aligned in their respect for this goal: “Rather than having independent team owners flaunting their wealth, investor operators pay for a share in the league. The arrangement should prevent disputes over shared revenues or from exploiting salary cap loopholes by controlling the acquisition of players.”²⁵⁹ In many respects, this attitude has not changed that much. The overarching goal is prosperity for the league, even if it comes at the expense of the rules’ simplicity and stability.

Notwithstanding the fact that the league is structured and operated to enhance the combined interests of the investor-operators, partner incongruence appears to be a continuing problem. For example, there are wide variations in the activity of each investor-operator group’s offseason to improve their respective teams. Grant Wahl, a senior writer on soccer for *Sports Illustrated*, annually ranks teams according to how ambitious they are in building a team and an organization.²⁶⁰ As Wahl states in explaining the rationale for his rankings, “MLS is certainly an ambitious league, with commissioner Don Gar-

257. See *supra* text accompanying notes 24-28.

258. Delgado, *supra* note 23, at 295 n.3 (quoting Peter Bridgewater, in J. Meacham, *Soccer Reboots: Major League Soccer Confident in New Game Plan*, SAN JOSE MERCURY NEWS, Apr. 3, 1996, at D1, D8).

259. Francis and Zheng, *supra* note 26, at 556 (quoting Alan Rothenberg).

260. Grant Wahl, *Behind the MLS Ambition Rankings: Inside Info on Each Team*, SPORTS ILLUSTRATED (Mar. 4, 2016), <http://www.si.com/article-list/mls-ambition-rankings-details/mls-ambition-rankings-la-galaxy>.

ber saying he wants it to be one of the world's top soccer leagues by 2022. But some MLS clubs are more ambitious than others"²⁶¹

Wendy Thomas, an attorney and soccer commentator explains the "deepening discord among MLS owners."²⁶²

MLS ownership groups are now segregated into three factions: the New Guard (who want to raise the salary cap, splash the cash on acquiring big name players, and win championships), the Moderates (who target mid-price DP acquisitions and hope to punch above their weight in competing for championships) and the Old Guard (those owners who oppose raising the salary cap and prefer relying on cheap young talent in lieu of expensive imports). The New Guard include Toronto FC, NYCFC, LA Galaxy, Seattle Sounders, and Orlando City, the Moderates include clubs like Kansas City, the Portland Timbers, and the Houston Dynamo, and the Old Guard include clubs like FC Dallas and DC United.²⁶³

According to Thomas, this partner incongruence is likely to worsen as new owners come online amid MLS expansion:

This disconnect among MLS owners between being wildly ambitious and deeply pragmatic will only become more pronounced in the future. Both Arthur Blank of Atlanta United FC and the LAFC ownership group have announced their intentions to be big players in MLS. Indeed, LAFC's owners (a motley crew which includes former NBA star Magic Johnson, venture capitalist Henry Nguyen, entertainment executive Peter Guber and lifestyle guru Tony Robbins) have all but publicly declared that they plan to make a play for Cristiano Ronaldo in 2018. Further, if David Beckham's Miami project ever gets off the ground, rest assured that Beckham United plans to splash the cash to preserve Beckham's luxe brand.²⁶⁴

Effectively, the rise in the fee required for investors seeking to operate new teams has meant that new owners are likely motivated to invest by different things than original owners. They also did not live through the downtimes of MLS contraction and near-bankruptcy in the early 2000s like the original owners.

This complex design of the Targeted Allocation Money rule appears to be designed specifically to counteract the growing incongruence of the owners. If the focus was on enabling teams to acquire a few more superstar players, the league could have increased the max-

261. Grant Wahl, *The 2016 MLS Ambition Rankings*, SPORTS ILLUSTRATED (Mar. 4, 2016), <http://www.si.com/planet-futbol/2016/03/04/2016-mls-ambition-rankings> [<https://perma.cc/M955-QK8L>].

262. Wendy Thomas, *The Signing of Dos Santos: Is MLS at the Tipping Point?*, CORNER OF THE GALAXY (July 20, 2015), <http://cornerofthegalaxy.com/2015/07/20/the-signing-of-dos-santos-is-mls-at-the-tipping-point/> [<https://perma.cc/JT9X-ZM9S>].

263. *Id.*

264. *Id.*

imum number of Designated Players from three to four or more, or it could have created a new category of Designated Players for mid-tier salaries and not counted it against the maximum limit for Designated Players generally.²⁶⁵ Both of these alternatives, however, would have left it to the discretion of the investor-operators whether they wanted to fill those slots, and it would have only further widened the gap between teams with owners who wanted to spend and owners who did not. Alternatively, it could have simply increased each team's Salary Budget, but that would have risked enabling investor-operators to simply use the new money to substitute for money out of their own pockets that they might have used to acquire a low-cost Designated Player. Instead, the Targeted Allocation Money rule is structured to prod investor-operators to acquire higher priced talent.²⁶⁶ By requiring that teams use the TAM provided to them, trade it, or lose it, and requiring that they sign a new DP at an equivalent salary if they use the TAM to buy-down an existing DP, it is clear that the complexity of the rule is designed to force the investor-operators to act in a way that would further the league's goals of acquiring new mid-range talent.

2. *Uncertainty and Changing Circumstances*

If the complexity of a rule like Targeted Allocation Money addresses the problem of partner incongruence, the complexity associated with constantly changing MLS rules addresses the problem of long-term contracting amidst uncertainty. One of the main sources of this uncertainty is that the league operates in a unique competitive environment for acquiring players. The number of viable alternatives for individuals looking to play soccer professionally exceeds those in virtually any other American team sport.²⁶⁷ Not only is there at least one other professional soccer league in the U.S.—the North American

265. Such an option was specifically raised and rejected in connection with the L.A. Galaxy's rumored pursuit of Swedish star Zlatan Ibrahimović, although with the qualifier that such a rule change would not happen "midseason." Andy Edwards, *Report: MLS Won't Change Rules to Allow Galaxy to Sign Zlatan This Year*, NBC SPORTS PRO SOCCER TALK (May 15, 2016, 6:51 PM), <http://soccer.nbcsports.com/2016/05/15/report-mls-wont-change-rules-to-allow-galaxy-to-sign-zlatan-this-year/> [<https://perma.cc/2Z6S-R2YY>]. One could imagine a change occurring for the right player, which might be Ibrahimović.

266. Kevin McCauley, *MLS Made up an Awesome New Rule to Stick It to Cheapskate Owners*, SB NATION (July 8, 2015, 1:43 PM), <http://www.sbnation.com/soccer/2015/7/8/8913401/mls-targeted-allocation-money-giovani-dos-santos-la-galaxy> [<https://perma.cc/L35C-X25L>]; Ryan Rosenblatt, *MLS Keeps Changing Its Rules for the Galaxy, and That's Not a Bad Thing*, FUSION (July 6, 2015, 10:21 AM), <http://fusion.net/story/161370/mls-rule-change-galaxy-core-player/> [<https://perma.cc/2URH-CCRS>].

267. See Branko Milanovic, *The World at Play: Soccer Takes on Globalization*, YALE GLOBAL ONLINE (June 15, 2010), <http://yaleglobal.yale.edu/content/world-play-soccer-takes-globalization> [<https://perma.cc/A35N-TNY3>] ("The market for professional soccer players is, by far, the most globalized labor market.").

Soccer League—that arguably seeks to compete with MLS for players,²⁶⁸ there is also a global market for soccer players. Most of the leagues around the world are much farther along in their development than MLS. Although there are some limited foreign markets in a few other American sports—such as baseball, basketball, and hockey—the global market for soccer players is vast and the cross-border transfer market is robust. Moreover, transfers are not simply the province of each individual league. They are regulated by rules adopted by the Fédération Internationale de Football Association (FIFA), the governing body of all football associations, as well as by the immigration laws of the individual nations and regional bodies such as the European Union. Major League Soccer’s player acquisition system, therefore, must operate against the backdrop of this global market for players.

Major League Soccer also operates in a continually changing environment from a revenue perspective. Attendance has increased dramatically in recent years, with the average per game growing twenty percent between 2014 and 2015 from 19,147 to 21,574.²⁶⁹ This was seventh globally among soccer leagues, ahead of the first divisions in France, the Netherlands, Argentina, and Brazil.²⁷⁰ It also ranks well ahead of the average attendance in the NBA and the NHL.²⁷¹ Television revenue has also increased dramatically from the early days when the league had to pay to induce networks to carry their games to now, when the league is operating under an eight-year contract signed in 2015 with ESPN, FOX, and Univision to carry its national games for \$90 million per year.²⁷² Combined with the expansion fees received from the new investor-operators that have entered the league in the last few years, it is not surprising that Forbes rated the average team’s worth at \$157 million, up fifty-two percent over the average just two years earlier.²⁷³

268. One example where a player turned down an opportunity to sign with an MLS team in favor of an NASL team is former LA Galaxy youth academy player Haji Wright, who inked a deal with the NY Cosmos after failing in his bid to establish sufficient residency in Germany to sign a contract before age eighteen with Schalke. Howard Megdal, *Haji Wright, The Young Star Who Chose New York Cosmos over MLS and Europe*, THE GUARDIAN (Sept. 2, 2015, 5:00 PM), <http://www.theguardian.com/football/blog/2015/sep/02/haji-wright-the-young-star-who-chose-new-york-cosmos-over-mls-and-europe> [https://perma.cc/A8VM-8SBJ].

269. *MLS Sets New Attendance Record, Seattle Hold Highest Average in League*, MLS SOCCER (Oct. 26, 2015, 1:18 PM), <http://www.mlssoccer.com/post/2015/10/26/mls-sets-new-attendance-records-seattle-hold-highest-average-league> [https://perma.cc/G3K5-9AB4].

270. *Id.*

271. Chris Smith, *Major League Soccer’s Most Valuable Teams*, FORBES (Aug. 19, 2015, 12:32 PM), <http://www.forbes.com/sites/chris-smith/2015/08/19/major-league-soccer-s-most-valuable-teams-2015-2/2/#32e261bf6389>.

272. *Id.*

273. *Id.*

The changing fiscal and competitive environment necessitates the flexibility to change rules on the fly under the current governance structure. Sigi Schmid, a long-time coach in MLS who currently is the skipper for the Seattle Sounders, captured the essence of the league's approach when he discussed the new TAM provision and the Designated Player rules:

I remember when I first came into the league, (former U.S. national team coach) Bob Gansler called it, "rule du jour." . . . But at the end of the day, when you really look at it, the league has given themselves the flexibility. . . . They don't have all the rules codified like some people would like because it has given them the flexibility to adjust and make the common sense decisions that are best for the league.²⁷⁴

The single-entity structure thus allows decisions to be made quickly, either by the league office itself or by the vote of the investor-operators. Although this comes at the cost of transparency and predictability, it offers the advantage of adaptability.

3. *Is MLS Excessively Complex?*

In evaluating whether rules are needlessly complex under the standard for contractual complexity, the basis is not the cost of interpreting and complying with the rule, but whether the complexity makes investment in the enterprise unattractive. In the case of MLS, if the complexity of the Roster Rules and Regulations were excessive, you would expect to see potential investor-operators opting out because of it or paying less than they might have otherwise. Instead, ownership groups are lining up to get a chance to bid for expansion teams. According to Commissioner Don Garber, "[t]here is no shortage of demand for MLS expansion teams,"²⁷⁵ with cities ranging from Detroit, Indianapolis, Las Vegas, Sacramento, San Antonio, and St. Louis all rumored to be vying for the next round of slots.²⁷⁶ Moreover, expansion fees in the last round went over \$100 million for the first

274. Matt Pentz, *Ahead of Sounders-Galaxy, Sigi Schmid on the Far-Reaching Impact of the Designated Player Rule*, SEATTLE TIMES (Aug. 8, 2015, 7:49 PM), <http://www.seattletimes.com/sports/sounders/ahead-of-sounders-galaxy-sigi-schmid-on-the-far-reaching-impact-of-the-designated-player-rule/> [https://perma.cc/TL99-KRHE].

275. *MLS Announces Possible Plans to Expand League to 28 Teams, 2016 Scheduling Updates*, MLS SOCCER (Dec. 6, 2015, 3:05 PM), <http://www.mlssoccer.com/post/2015/12/05/mls-announces-possible-plans-expand-league-28-teams-scheduling-updates> [https://perma.cc/6QZT-R7KQ].

276. Jeff Carlisle, *Examining the Candidates for the Next Round of MLS Expansion*, ESPN FC (May 7, 2015), <http://www.espnfc.us/major-league-soccer/19/blog/post/2438275/examining-the-candidates-for-the-next-round-of-mls-expansion> [https://perma.cc/S3MD-RFGE]; Chris Kudialis, *If Cashman Field Becomes a Soccer Field, MLS Is Interested*, LAS VEGAS SUN (Jan. 17, 2016, 2:00 AM), <http://lasvegassun.com/news/2016/jan/17/if-cashman-field-gets-tranformed-into-soccer-stadi/> [https://perma.cc/7A5D-WEQH].

time ever, indicating that the complexity of MLS' rules have not served to undercut the price.²⁷⁷ It is clear that MLS' complexity is not considered a factor weighing against investment in the league. Indeed, it may be that investor demand is stoked in part because potential investors know that MLS' complexity will ensure that partners remain aligned on key issues such as the single-entity structure and unrestricted free agency.

V. CONCLUSION

Major League Soccer's Roster Rules and Regulations are complex, but that complexity is a design feature rather than a flaw in execution. Critics of the league's complexity have judged the rules under the standards used to evaluate legal complexity, arguing that the costs associated with interpreting and applying the rules outweigh any fairness advantages it provides. Major League Soccer, however, is better evaluated under a contractual complexity framework. The league is a single-entity limited liability company. All of its investor-operators are members of the LLC and, in their capacity as members of the Board of Governors, they participate in the creation and enforcement of the rules. Moreover, they all contract with MLS to operate a team pursuant to the rules devised by the league. As contractual rules, they are better understood as responding to the problems of partner incongruence and uncertainty in a long-term contracting environment. As long as the complexity is not so severe as to chill investment or to interfere with the ability of the league to compete, then it may be justified. This is particularly true since partner incongruence has increased with the admission of new investors and uncertainty has grown with the changing environment for professional soccer.

Although the complex nature of MLS' Roster Rules and Regulations may be necessary to keep the investor-operators aligned and to permit the league to remain adaptable, it could soon become counterproductive. It may be that greater transparency and simplicity is necessary, not so much to protect the teams, but to convince the fans that the league is actually a first-class enterprise.²⁷⁸ Indeed, there may come a time when, to fully realize its potential as a top league, MLS will need to revisit its objectives and move past its insistence on cost containment and the pursuit of strategic opportunities. At that time, complex rules and the single-entity structure may need to be abandoned. For now, however, Major League Soccer is a classic example of the use of complexity to achieve organizational success.

277. Grant Wahl, *The Inside Story of How New MLS Team LAFC Went from Dream to Reality*, SPORTS ILLUSTRATED (Nov. 7, 2014), <http://www.si.com/soccer/planet-futbol/2014/11/07/henry-nguyen-tom-penn-mls-lafc-los-angeles-football-club> (reporting that the LAFC investor group paid a record \$110 million fee to join MLS).

278. Schaelaerckens, *supra* note 13.